

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARKELLE NEAL TAYLOR,

Petitioner,

No. CIV S-05-0788 MCE GGH P

vs.

TOM CAREY, et al.,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding through counsel with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2002 conviction for the second degree murder (Cal. Penal Code § 197(a)) of Marcel White and the infliction of corporal injury resulting in a traumatic condition on Garvon White (Cal. Penal Code § 273.5(a)). The jury also found that petitioner inflicted great bodily injury under circumstances involving domestic violence (Cal. Penal Code § 12022.7(e)) and that with intent to injure and without consent petitioner personally inflicted injury on Garvon White, whom he knew or should have known was pregnant and the injury resulted in the termination of her pregnancy (Cal. Penal Code § 12022.9, former section (a)). Petitioner is serving a sentence of 15 years to life.

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1 This action is proceeding on the amended petition filed December 11, 2005. After
2 carefully considering the record, the court recommends that the petition be denied.

3 II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

4 The AEDPA “worked substantial changes to the law of habeas corpus,”
5 establishing more deferential standards of review to be used by a federal habeas court in
6 assessing a state court’s adjudication of a criminal defendant’s claims of constitutional error.
7 Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

8 In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme
9 Court defined the operative review standard set forth in § 2254(d). Justice O’Connor’s opinion
10 for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy
11 between “contrary to” clearly established law as enunciated by the Supreme Court, and an
12 “unreasonable application of” that law. Id. at 1519. “Contrary to” clearly established law applies
13 to two situations: (1) where the state court legal conclusion is opposite that of the Supreme
14 Court on a point of law, or (2) if the state court case is materially indistinguishable from a
15 Supreme Court case, i.e., on point factually, yet the legal result is opposite.

16 “Unreasonable application” of established law, on the other hand, applies to
17 mixed questions of law and fact, that is, the application of law to fact where there are no factually
18 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
19 Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the
20 AEDPA standard of review which directs deference to be paid to state court decisions. While the
21 deference is not blindly automatic, “the most important point is that an *unreasonable* application
22 of federal law is different from an incorrect application of law....[A] federal habeas court may not
23 issue the writ simply because that court concludes in its independent judgment that the relevant
24 state-court decision applied clearly established federal law erroneously or incorrectly. Rather,
25 that application must also be unreasonable.” Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at
26 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the

1 objectively unreasonable nature of the state court decision in light of controlling Supreme Court
2 authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

3 The state courts need not have cited to federal authority, or even have indicated
4 awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S.
5 Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is
6 contrary to, or an unreasonable application of, established Supreme Court authority. Id. An
7 unreasonable error is one in excess of even a reviewing court's perception that "clear error" has
8 occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175 (2003). Moreover, the
9 established Supreme Court authority reviewed must be a pronouncement on constitutional
10 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
11 binding only on federal courts. Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 366.

12 However, where the state courts have not addressed the constitutional issue in
13 dispute in any reasoned opinion, the federal court will independently review the record in
14 adjudication of that issue. "Independent review of the record is not de novo review of the
15 constitutional issue, but rather, the only method by which we can determine whether a silent state
16 court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
17 2003).

18 When reviewing a state court's summary denial of a claim, the court "looks
19 through" the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234
20 F.3d 1072, 1079 n. 2 (9th Cir. 2000). On direct appeal, the California Court of Appeal was the
21 last state court to issue a reasoned decision. The California Supreme Court denied petitioner's
22 petition for writ of habeas corpus without comment or citation. As to each claim, this court will
23 discuss which state court opinion is entitled to AEDPA deference.

24 III. Factual Background

25 The opinion of the California Court of Appeal contains a factual summary of
26 petitioner's offense. After independently reviewing the record, the court finds this summary to

1 be accurate and adopts it below.

2 In August 2001 defendant lived with Garvon White in Sacramento.FN1 White
3 was seven months pregnant with defendant's child.

4 FN1. All further dates are in 2001 unless otherwise stated.

5 On August 9, White and defendant argued. She told him he could pack his things
6 and leave. He got angry and punched her in the head. White said she would do
7 what the mother of his other children had done-take his baby and leave so he
8 could not see it. She knew this would anger him.

9 Defendant punched White twice in the stomach, knocking her down. He kept on
10 hitting her while she was on the floor as he spoke to his brother on the telephone.
11 Looking sweaty and crazed, he yelled: "I don't want this baby." "I don't want this
12 bitch to have my baby." He hit her six times in the stomach altogether.FN2

13 FN2. At trial, White testified that she could not recall telling the police
14 defendant had hit her six times and claimed she had exaggerated the
15 severity of the assault out of anger. Before trial she had falsely told a
16 defense investigator that another woman punched her in the stomach, not
17 defendant. White was an extremely reluctant witness who testified in
18 custody after evading subpoena and being brought in on a bench warrant.
19 Although she told a story generally in line with her prior statements (aside
20 from that given to the defense investigator), she minimized defendant's
21 actions as far as possible and portrayed herself as habitually violent toward
22 defendant and others.

23 White felt a knot in her stomach and became frightened. Defendant said he was
24 afraid he had killed or hurt the baby. He later said to a neighbor that he had
25 screwed up and did not want to be charged with murder if the baby died.

26 White walked across the street to a fire station. A paramedic, after interviewing
her, had her transported by ambulance to the hospital where Dr. Derek Wong,
White's obstetrician/gynecologist, was on duty. Dr. Wong had cared for White
during her pregnancy, which had been uncomplicated up to then, with a delivery
due date of October 31.

White told Dr. Wong defendant had hit her five or six times in the stomach and
she was cramping. Dr. Wong found significant bruising. After performing a
maternal blood test, a fetal heart rate check, and an ultrasound examination, he
decided to perform an immediate Caesarean section surgery (C-section). He
suspected internal bleeding from a placental abruption, or premature separation of
the placenta from the uterine wall, which could kill the fetus from ongoing blood
loss.

On performing the C-section, Dr. Wong discovered a placental abruption which
had produced blood inside the amniotic fluid and a large blood clot. The beating
White had described could cause such an injury. There was no evidence that
anything else had caused it.

1 When delivered by C-section on August 9, the baby (named Marcel) was just over
2 28 weeks old and weighed less than three pounds. Although 80 to 90 percent of
3 babies born that prematurely survive, there are always complications, and such a
4 baby needs months of care to be able to live outside the nursery.

5 Marcel also had Down's syndrome, including a heart defect normally repairable by
6 surgery. His premature birth did not cause these conditions, but it made them
7 harder to treat.

8 Dr. Faisal Ezzedeen, a neonatologist, put Marcel on life-support systems, then
9 began treating him for the problems caused by his heart defect and by the
10 immaturity of his lungs and gastrointestinal tract.

11 One risk caused by prematurity is necrotizing intercolitis, a condition almost
12 never found in full-term babies. It develops some time after birth, often very
13 suddenly. In this condition, believed to result from the underdeveloped state of the
14 infant's digestive system, an infection takes hold in the small bowel, which causes
15 the mucosa to slough off, sometimes leading to necrosis and perforation.

16 Marcel was fed through a tube for the first week after his delivery. Oral feeding
17 began on August 17.

18 On September 5, Marcel's abdomen distended and he began spitting up his food.
19 The treatment team determined necrotizing intercolitis had set in. Antibiotics did
20 not help. Exploratory surgery found that the small bowel was almost entirely dead,
21 an inevitably fatal condition. Taken off life support, Marcel died.

22 In Dr. Ezzedeen's opinion, it was extremely unlikely that Marcel would have
23 developed necrotizing intercolitis if born at term; Dr. Ezzedeen had treated over
24 100 cases and had never seen one in a full-term baby. He could not exclude
25 Marcel's heart defect as a risk factor for the condition, but it was not the cause.
26 The medical community does not know why the condition is more severe in some
infants than in others.

Dr. Gregory Reiber, a forensic pathologist, performed an autopsy on Marcel on
September 6. He opined that death occurred due to complications of prematurity,
with the additional complicating factor of a congenital heart defect. At 28 weeks,
Marcel was very premature, almost extremely so; babies born that prematurely
can develop malfunctions of the brain, lungs, intestines, liver, and kidneys.

In Dr. Reiber's opinion, Marcel's prematurity was the "proximate cause" of death,
but it was also "a primary factor leading to the [necrotizing intercolitis]." This can
be so because immature lungs deliver insufficient oxygen to the intestinal tract,
and because oral feeding can lead to gastrointestinal difficulties. Marcel's
inadequate lung development had caused respiratory diseases and brain
hemorrhages before his death.

According to Dr. Reiber, if Marcel had been born at term with the same Down's
syndrome and heart defect, he would have had only a 5- to 6-percent risk of
mortality. However, the heart defect increased his risk for the complications
associated with prematurity.

1 On August 10, Garvon White told Laura Bardman Murray, a social worker, that
2 she and defendant had been in a violent relationship for a year; once he broke her
3 arm while she was pregnant. On August 12, White told Murray defendant had
4 beaten her abdomen another time during the pregnancy but she had not reported it.

5 Thelma Cruz-Taylor, defendant's estranged wife and the mother of his children,
6 testified that defendant had repeatedly slapped and struck her while she was
7 pregnant. In 1998, after she had left him and taken the children, he came to her
8 apartment, told her he would be happy only if she were dead, and choked her.

9 Additional facts appear below as relevant to particular issues.

10 Opinion of California Court of Appeal lodged May 30, 2007, pp. 4-8.¹

11 IV. Discussion

12 A. Claim 1: Prosecutorial Misconduct

13 Petitioner alleges that the prosecutor committed misconduct by violating a court
14 order concerning presentation of testimony which implied that petitioner or his counsel
15 influenced White to make statements favorable to the defense. The background to this claim is
16 as follows.

17 The prosecutor proposed calling Deputy District Attorney Ore to testify regarding
18 his interaction with White before the murder charges were filed. The prosecutor argued that
19 Ore's testimony was relevant to establish that White's attitude toward the case changed after she
20 had conversations with the defense team or petitioner himself. RT at 669. The prosecutor
21 theorized that White's claim that she herself was the aggressor was fabricated because she did
22 not want petitioner to be convicted. RT at 669, 674.

23 The trial court ruled that White's attitude toward the prosecution was relevant and
24 that Ore could discuss those issues and any reference to *petitioner* telling her how to testify or
25 influencing it, but not any member of the defense. RT at 669. The prosecutor was supposed to
26 notify Ore that he was precluded from making any insinuation relating to the defense engaging in

¹ The state court records lodged by respondent do not contain numbers, for example,
"lodged document no.1." For that reason, the court refers to the document by name rather than
number.

1 unethical behavior. RT at 669.

2 During defense counsel's cross-examination of Ore on Thursday July 11, 2002, he
3 testified in violation of the court order described above:

4 Q: And did she tell you anything about whether she had ever done anything to Mr.
5 Taylor in the past?

6 A: Soon after the death of the baby, in one of our meetings, she had met with, I
7 believe, Mr. Taylor or the defense and began talking about things she had done,
8 aggressive things.

8 RT at 657.

9 Defense counsel did not object to the answer at that time. At the conclusion of
10 Ore's testimony that day, the prosecution called another witness. When court resumed on
11 Monday July 15, 2002, petitioner's counsel moved for a mistrial based on Ore's testimony set
12 forth above. Defense counsel stated that she did not object at the time Ore testified because she
13 decided that calling attention to it at the time would cause more damage. RT at 672. Petitioner's
14 counsel argued that the defense had not attempted to influence White, as suggested by Ore. RT
15 at 669. Defense counsel also argued that if there was to be an insinuation of unethical behavior
16 on the part of the defense team, it would create a conflict of interest for the defense. RT at 670.
17 Counsel also argued that the insinuation undermined the credibility of the defense. RT at 670.

18 The trial court found that the prosecution had not elicited the testimony. RT at
19 675. It is also clear, and undisputed, that the prosecutor had informed Ore of the protective order
20 before his testimony. RT at 722.

21 The court found that Ore's testimony violated the order which prohibited him
22 from testifying that White's testimony was influenced by her contact with the defense team. RT
23 at 684. The court denied the motion for a mistrial and instead ordered the reporter's transcript
24 modified to eliminate the improper testimony. RT at 693-694. The court ordered the
25 prosecution to call Ore to the stand outside of the presence of the jury. In this proceeding, Ore
26 testified that the prosecutor had told him that the court ordered her not to ask him any questions

1 regarding whether White spoke to the defense or defense team. RT at 722. Ore testified that he
2 understood the court's order as limiting mention of White meeting with defense counsel, but not
3 the defense investigator. RT at 725. Outside of the presence of the jury, Ore testified that he
4 believed that White had been swayed by defense counsel and/or her investigator, although he had
5 no evidence of this. RT at 725-726.

6 Because Ore believed that the defense had influenced White's testimony, he was
7 not recalled to testify. Instead, the jury was read the following stipulation:

8 There is no evidence that the defendant told Garvon White what to say or how to
9 testify. Number two—that was number one. Number two, any reference by Mr.
10 Ore to a meeting between Ms. White and the defense refers to the October 17
11 interview with Ms. Lundberg and Ms. Odbert.

12 RT at 740.

13 The California Court of Appeal rejected this claim for the following reasons:

14 To begin with, we reject defendant's assertion that the prosecutor committed
15 misconduct by encouraging misconduct of the witness. It is misconduct for a
16 prosecutor to use deceptive or reprehensible methods to persuade the court or the
17 jury. (People v. Hill (1998) 17 Cal.4th 800, 819.) However, the trial court found
18 the prosecutor had not done so, and we agree. Contrary to defendant's
19 insinuation, there is nothing in this record to show that the prosecutor violated the
20 court's order or knowingly elicited Ore's improper testimony. The record shows,
21 rather, that after the court made its original order the prosecutor scrupulously
22 avoided asking any questions which would have called for the kind of answer Ore
23 gave. The question which produced that answer clearly did not call for it and the
24 prosecutor could not have anticipated that Ore would give such an answer. Ore's
25 misconduct, which took everyone by surprise, cannot be imputed to the
26 prosecutor.

Furthermore, defendant did not raise a timely objection and request for
admonition, which is normally required to preserve a claim of misconduct on
appeal. (People v. Hill, *supra*, 17 Cal.4th 800, 820.) Absent an explanation why
such measures would not have cured the harm, counsel's next-day mistrial motion
did not suffice to preserve issue.

In addition, defendant fails to explain why counsels' stipulations as read to the
jury were insufficient to cure any possible harm. The court properly instructed the
jury it was required to take those stipulations as proven fact. Having been
instructed that there was no evidence of any meetings between defendant and
White, or any meeting between White and defense counsel other than one about
which the jury had already heard evidence, the jury was presumably able to follow
the court's instruction. (People v. Adcox (1988) 47 Cal.3d 207, 253.)

1 Defendant has shown no grounds for reversal at this time.

2 Opinion of California Court of Appeal, pp. 35-36.

3 In the answer, respondent argues that petitioner's claim is procedurally defaulted
4 because the California Court of Appeal found the claim waived based on defense counsel's
5 failure to timely object.

6 The California Supreme Court summarily denied petitioner's petition for review.
7 See September 28, 2004, order by California Supreme Court denying petition for review lodged
8 May 21, 2007. "[W]here, as here, the last reasoned opinion on the claim explicitly imposes a
9 procedural default, we will presume that a later decision rejecting the claim did not silently
10 disregard that bar and consider the merits." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct.
11 2590 (1991). Applying the look through doctrine, it follows that the California Supreme Court's
12 denial was on the procedural grounds stated in the opinion of the California Court of Appeal.

13 Under the doctrine of procedural default, a petitioner who has defaulted on his
14 claims in state court is barred from raising them in federal court so long as the default is
15 "pursuant to an independent and adequate state procedural rule." Coleman v. Thompson, 501
16 U.S. 722, 750, 111 S.Ct. 2546 (1991). In Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003),
17 the Ninth Circuit adopted a burden-shifting analysis to determine adequacy. Under this analysis,
18 the state may plead, as an affirmative defense, that the petitioner's failure to satisfy a state
19 procedural bar should foreclose federal review. 322 F.3d at 586. Once the state pleads the bar,
20 the burden shifts to the petitioner to challenge the adequacy of that bar by showing that it has
21 been inconsistently applied. Id. The state has the ultimate burden of proving adequacy. Id.

22 In the instant case, the California Court of Appeal found that petitioner's claim
23 was barred based on counsel's failure to object at trial. California's contemporaneous objection
24 rule is an independent and adequate state procedural rule that precludes federal review of claims.
25 Paulino v. Castro, 371 F.3d 1083, 1092-1093 (9th Cir. 2004).

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1 If there is an independent and adequate state ground for the decision, the federal
2 court may still consider the claim if the petitioner demonstrates: (1) cause for the default and
3 actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental
4 miscarriage of justice. Harris, 489 U.S. at 262, 109 S. Ct. at 1043. The existence of cause for a
5 procedural default must ordinarily turn on whether the prisoner can show that some objective
6 factor external to the defense impeded counsel's efforts to comply with the State's procedural
7 rule. McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S. Ct. 1454, 1476 (1991). Examples of
8 cause include showings "that the factual or legal basis for a claim was not reasonably available to
9 counsel," "that some interference by officials made compliance impracticable," or "of ineffective
10 assistance of counsel." Murray, 477 U.S. at 488, 106 S. Ct. at 2645. Prejudice is difficult to
11 demonstrate:

12 The showing of prejudice required under Wainwright v. Sykes is
13 significantly greater than that necessary under "the more vague
14 inquiry suggested by the words 'plain error.'" Engle, 456 U.S., at
15 135, 102 S.Ct., at 1575; Frady, *supra*, 456 U.S., at 166, 102 S.Ct.,
16 at 1593. See also Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct.
17 1730, 1736, 52 L.Ed.2d 203 (1977). The habeas petitioner must
show "not merely that the errors at ... trial created a possibility of
prejudice, but that they worked to his actual and substantial
disadvantage, infecting his entire trial with error of constitutional
dimensions." Frady, *supra*, at 170, 102 S.Ct., at 1596.

18 Murray v Carrier, 477 U.S. at 493-494, 106 S. Ct. at 2648 (1986).

19 Although different phraseology is used in the default context from that used in the ineffective
20 assistance of counsel prejudice inquiry, as stated above, the ultimate application of the two
21 prejudice inquiries is essentially similar – that is, whether the prejudice is sufficient to have
22 undermined the reviewer's confidence in the result of the trial.

23 Because the prosecutor committed no misconduct, petitioner has shown neither
24 prejudice nor a fundamental miscarriage of justice. In this case, Ore voluntarily testified in
25 violation of the court order in response to a question by defense counsel. There is no evidence in
26 the record suggesting that the prosecutor had any involvement in the misconduct by the witness.

1 Because no prosecutorial misconduct occurred, petitioner cannot demonstrate prejudice or a
2 fundamental miscarriage of justice. See U.S. v. Christophe, 833 F.2d 1296, 1300-1301 (9th Cir.
3 1987) (no prosecutorial misconduct where transcript shows that witness volunteered at-issue
4 testimony); U.S. v. Etsitty, 130 F.3d 420, 424 (9th Cir. 1997) (no prosecutorial misconduct where
5 “[n]othing in the questioning or the answers given can be construed to reflect an intention by the
6 prosecutor to mislead the jury.”).

7 For the reasons discussed above, this claim should be denied as procedurally
8 barred.

9 B. Shackling

10 Petitioner argues that he was visibly shackled in front of the jury. In the answer,
11 respondent argues that the instant claim is procedurally barred because petitioner’s counsel did
12 not object. Petitioner raised this claim in his petition for writ of habeas filed in the California
13 Supreme Court. See Petition filed in California Supreme Court, lodged May 21, 2007. On
14 November 15, 2006, the California Supreme Court denied the petition without comment or
15 citation. See Order by California Supreme Court lodged May 21, 2007. Respondent’s argument
16 that this claim is procedurally barred is without merit because no state court found the claim
17 defaulted.

18 “Visible shackling of a criminal defendant during trial ‘undermines the
19 presumption of innocence and the related fairness of the factfinding process’ and ‘affront[s] the
20 ‘dignity and decorum of judicial proceedings that the judge is seeking to uphold.’” Larson v.
21 Palmateer, 515 F.3d 1057, 1062 (9th Cir. 2008), quoting Deck v. Missouri, 544 U.S. 622, 630-
22 31, 125 S.Ct. 2007 (2005). “The Supreme Court has therefore held that ‘the Fifth and Fourteenth
23 Amendments prohibit the use of physical restraints visible to the jury absent a trial court
24 determination, the exercise of its discretion, that they are justified by a state interest specific to a
25 particular trial.’” Id., quoting Deck v. Missouri, 544 U.S. at 629, 125 S.Ct. 2007. “The Court
26 described this principle as one that is ‘deeply embedded in the law,’ reflecting a consensus

1 ‘dating back to the 19th century.’ Id., quoting Deck v. Missouri, 544 U.S. at 629, 125 S.Ct.
2 2007. “Visible restraints are therefore not permitted unless the trial court finds that they are
3 necessary while ‘tak[ing] account of the circumstances of the particular case.’” Id., quoting Deck
4 v. Missouri, 544 U.S. at 632, 125 S.Ct. 2007.

5 Petitioner argues that the following facts support this claim. During jury
6 selection, the court told the jury that petitioner was in custody:

7 Probably most of you have figured this out now. But Mr. Taylor is in custody.
8 That’s something that has nothing to do with the evidence in this case. It doesn’t
9 assist the prosecution in proving him guilty. It is something that you shouldn’t
10 take into consideration.

11 About the only effect it will have on you is that Mr. Taylor doesn’t get himself to
12 court. The Sheriff’s Department has to bring him. They are short staffed, which
13 means that we will seldom start exactly on time. So that’s how it will affect you.

14 So if we are late, generally, it’s because we are waiting for a deputy to free up an
15 escort Mr. Taylor to the courtroom. So that’s the primary effect that it’s going to
16 have on you. And it’s the only thing that you can consider. If you want to
17 grumble about that, then you are certainly free to do so. But it can’t affect the way
18 you view the evidence in the case.

19 Can all of you assure us that Mr. Taylor’s custody status is not going to effect
20 your perception of the evidence, your weighing the evidence in this trial?

21 Reporter’s Augmented Transcript, p. 140.

22 Petitioner contends that on another occasion during jury selection, the court asked,
23 “And can you assure us that Mr. Taylor’s custody status is not going to be a factor in your
24 deliberations?” Reporter’s Augmented Transcript, p. 229. Later, defense counsel reminded the
25 jurors that her client might be late due to his being brought over from the jail. RT at 232.

26 In the amended petition, petitioner contends that he was allowed to wear street
clothes during the trial, but that he was handcuffed until being seated at the counsel table, and
handcuffed before being taken into the courtroom. Amended Petition, p. 14: 15-17. In the
amended petition, petitioner argues that a deputy sat ominously behind him at all times during
the proceedings. Id., p. 15: 17-18. Petitioner argues that the deputies assigned to the courtroom
were in such proximity to him that it was at all times obvious that petitioner was in their custody,

1 and that he was not free to move about as a non-custodial defendant would be. Id., p. 14: 18-20.

2 Petitioner further argues that the proximity of the sheriff's deputies to him
3 interfered with his ability to communicate with his attorney, breached attorney-client
4 confidentiality and deterred confidential communications between himself and trial counsel. Id.,
5 p. 14: 12-15.

6 As to petitioner's shackling claim, petitioner has cited no evidence suggesting that
7 the jury actually saw him handcuffed. It is not reasonable to infer from the comments by the
8 court and defense counsel that they must have been referring to the jury viewing petitioner in
9 restraints. Petitioner's claim, through counsel, in the amended petition that he was handcuffed in
10 the courtroom is not supported by any evidence, such as a declaration by petitioner, in either the
11 amended petition or reply to the answer. Counsel's verified statement in the amended petition is
12 not sufficient evidence of this claim. In any event, even if petitioner was handcuffed until being
13 seated and before being removed from the courtroom, there is no claim that the jury saw
14 petitioner during these times. Accordingly, this claim should be denied because it is conclusory
15 and unsupported by specific facts. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (holding that
16 conclusory allegations which are not supported by a statement of specific facts do not warrant
17 habeas relief).

18 Petitioners suggests that he was "constructively shackled," i.e. the jury knew he
19 was in custody based on the comments by the court and counsel during voir dire, etc. No clearly
20 established Supreme Court authority provides that it is unconstitutional for a jury to have
21 knowledge of a criminal defendant's custody status. Accordingly, such a claim is without merit.

22 Petitioner's claim that his proximity to the sheriff's deputies interfered with his
23 ability to communicate with counsel, breached attorney-client confidentiality and deterred
24 confidential communications between himself and trial counsel is similarly unsupported.
25 Petitioner cites no evidence or case law to support these claims. Accordingly, they are without
26 merit. James v. Borg, supra.

1 After independently reviewing the record, the court finds that the denial of these
2 claims by the California Supreme Court was not an unreasonable application of clearly
3 established Supreme Court authority. Accordingly, these claims should be denied.

4 C. Claim 3: Batson

5 Petitioner argues that the prosecutor's challenges to prospective jurors Hubbard
6 and Wade were motivated by racial discrimination in violation of Batson v. Kentucky, 476 U.S.
7 79, 106 S.Ct. 1712 (1986). In the answer, respondent contends that petitioner has "forfeited"
8 these claims because he did not raise them on direct appeal. On direct appeal, petitioner argued
9 that the prosecutor's challenge to juror Hubbard was motivated by religious discrimination in
10 violation of Batson.

11 In his petition for writ of habeas corpus filed in the California Supreme Court,
12 petitioner argued that the prosecutor's challenge to juror's Hubbard and Wade was motivated by
13 racial discrimination in violation of Batson. Accordingly, these claims are not "forfeited."

14 Petitioner has filed a motion for discovery as to the Batson claim regarding juror
15 Hubbard. The court begins by discussing that request.

16 "When a defendant in a criminal trial challenges the State's use of peremptory
17 strikes against racial minorities, trial courts must follow the analysis set forth in Batson v.
18 Kentucky, 476 U.S. 79 (1986), and its progeny." Green v. LaMarque, No. 06-16254, 2008 WL
19 2761321 * 1 (9th Cir. July 17, 2008). "First, when a criminal defendant challenges the state's
20 use of peremptory strikes, the defendant must make a prima facie case showing the challenge was
21 based on an impermissible basis, such as race." Id., citing Batson, 476 U.S. at 98. "This is a
22 burden of production, not a burden of persuasion." Id., citing Johnson v. California, 545 U.S.
23 162, 170-71, 125 S.Ct. 2410 (2005).

24 "Second, if the trial court finds the defendant has made a prima facie case of
25 discrimination, the burden then shifts to the prosecution to offer a race-neutral reason for the
26 challenge that relates to the case." Id., citing Johnson v. California, 545 U.S. 168, 125 S.Ct.

1 2410. “Third, if the prosecutor offers a race-neutral explanation, the trial court must decide
2 whether the defendant has proved the prosecutor’s motive for the strike was purposeful racial
3 discrimination.” Id. “When conducting the analysis at the third step, the trial court must decide
4 not only whether the reasons stated are race-neutral, but whether they are relevant to the case, and
5 whether those stated reasons were the prosecutor’s genuine reasons for exercising a peremptory
6 strike, rather than pretexts invented to hide purposeful discrimination.” Id. “In deciding if the
7 defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into
8 such circumstantial and direct evidence of intent as may be available.” Id., quoting Batson, 476
9 U.S. at 93.

10 “The ‘circumstantial and direct evidence’ needed for this inquiry may include a
11 comparative analysis of the jury voir dire and the jury questionnaires of all venire members, not
12 just those venire members stricken.” Id. at * 2. “If a prosecutor’s proffered reason for striking a
13 black panelist applies just as well to an otherwise-similar [footnote omitted] nonblack who is
14 permitted to serve, that is evidence tending to prove purposeful discrimination to be considered
15 at Batson’s third step.” Id., quoting Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317
16 (2005).

17 “Further, the prosecutor is responsible for articulating his own reasons for the
18 challenges exercised.” Id. “The Supreme Court has stressed that courts must be careful not to
19 substitute their own speculation as to reasons why a juror might have been struck for the
20 prosecutor’s stated reasons.” Id.

21 During voir dire, the prosecutor began by observing to prospective juror Hubbard
22 that she had noted in his questionnaire that he had a Bachelor’s degree in theology. Reporter’s
23 Augmented Transcript Volume I, p. at 185.

24 Prosecutor: Mr. Hubbard, good morning.

25 Hubbard: Good morning.

26 Prosecutor: I noted in your questionnaire, the first one you filled out, that you

1 have a Bachelor's degree in theology?

2 Hubbard: Yes.

3 Prosecutor: Can you tell us where did you go to school?

4 Hubbard: I went to Barber Bible Institute (ph) in Chicago, Illinois.

5 Prosecutor: Was that during your time with the armed forces?

6 Hubbard: That was after the armed forces. As a matter of fact, I resigned to go to
7 Bible school.

8 Prosecutor: Okay. And was this a four-year university.

9 Hubbard: Yes, correct.

10 Prosecutor: Did it strictly—it was the major that you can get this only in theology
11 or did they have it in other majors?

12 Hubbard: They had several other majors, yes.

13 Prosecutor: Did you pursue theology after you graduated?

14 Hubbard: Only in every day life, especially in thinking and serving.

15 Prosecutor: Did you ever become a minister of a church or assistant pastor of
16 anything like that?

17 Hubbard: No, not in that name. If I can assist in services, I will, such as whatever
18 I am needed in the church, as far as helping out with maybe teaching Bible study
19 or something like that.

20 Id. at 185-186.

21 Hubbard also stated that he had been in the military and now worked for the INS.

22 Id. at 186-187. At the present time, he worked for the INS. Id. at 6. He stated that he believed
23 that he could listen fairly and impartially to the evidence. Id.

24 After the prosecutor exercised a peremptory challenge as to prospective juror
25 Hubbard, defense counsel made a Wheeler motion². Reporter's Augmented Transcript, Volume
26 II, at 8. Defense counsel stated that Mr. Hubbard was the only African American in the whole

² A Wheeler motion is the California counterpart to a Batson motion. People v. Wheeler,
22 Cal.3d 258, 148 Cal.Rptr. 890 (1978).

1 panel, indicated that he worked for the government and had been in the army. Id. She stated that
2 his answers to the questionnaire indicated that he could follow the law that was applicable to the
3 case. Id. Defense counsel stated that Hubbard said he had a degree in theology which he did not
4 use in his daily life except as to treat others fairly. Id. at 8.

5 The court found that defense counsel had made a prima facie case of racial
6 discrimination. Id. at 9.

7 The prosecutor then explained that she struck Hubbard based on her concerns
8 regarding his religious views:

9 Your Honor, I reviewed all the questionnaires from the jurors that we received
10 before we actually saw them come into the courtroom. And I went ahead and I
11 rated whether or not I would potentially keep or challenge the prospective juror
just solely based on the questionnaire. And I have notes, in case the Court would
like to view them.

12 In my review of the notes in Mr. Hubbard's situation, before Mr. Hubbard ever
13 made it into the box, my notes indicate that I had a concern because he had a
bachelors degree in theology.

14 The concern to the People is that, and it has always been my position that people
15 who are either ministers or who have spent a significant time studying
16 religion—and I think four years at a university to study religion is a significant
17 amount of time—the People's concern, like I said, it's always been my concern that
18 people who devote that much time to their religion tend to be more sympathetic
and want to be more forgiving and would be more emotional in deciding the case.
They would tend to want to forgive the defendant as opposed to being objective
and looking at the facts.

19 I also had a concern because I'd like the record to reflect that there is a Bible
20 sitting in front of the defendant. So not only did I have a juror who had spent four
21 years studying theology and religion, but I also have a defendant who has shown
symbolically to this jury that he is religious. So, in that respect, I was concerned
that Mr. Hubbard would feel, even given his background in theology, even more
sympathetic for the defendant.

22 Id. at 10-11.

23 Defense counsel then argued,

24 Well, your Honor, I point out a couple of things.

25 Mr. Taylor's Bible just says it's the Good News Bible. It doesn't refer to any
26 specific religion. We don't know what religious beliefs Mr. Hubbard has. I never
questioned him about them. And, once again, he showed no indication that he

1 was going to be overly emotional or sympathetic.

2 This is a man who has been in combat in Vietnam and has done two tours of duty
3 and did not appears to have any of the traits that Ms. Dozier is indicating she was
weary [sic] of.

4 Id. at 11.

5 The trial court then denied the Wheeler motion:

6 All right. For the record, which bears this out, but at least all of this information
7 will be in one place for purposes of this motion. Mr. Taylor is African American.
Mr. Hubbard is African American.

8 The Court has required the People to explain the reason for the peremptory
9 challenge. And I will make a finding that the concerns expressed by the
10 prosecutor do justify the exercise of the peremptory challenge. It did not appear to
11 be a challenge based on race. There appear to be other factors which are credible
and which reflect tactical considerations which are permissible under the law.
And so I'm going to deny the Wheeler motion.

12 Id. at 11-12.

13 In the pending motion for discovery, petitioner seeks all notes taken by the
14 prosecutor concerning voir dire, and not just the notes relating to Hubbard. Petitioner contends
15 that in considering the totality of the circumstances, the court should consider whether the notes
16 reflect any differences in treatment due to race, and whether the notes reflect concerns with other
17 jurors' religious views.

18 If a petitioner "failed to develop the factual basis for a claim" in state court, the
19 federal court "shall not hold an evidentiary hearing on the claim" unless the petitioner can show
20 that one of two narrow statutory exceptions is applicable. 28 U.S.C. § 2254(d)(2). A request to
21 expand the record with new documentary evidence that is intended to serve the same purpose as
22 an evidentiary hearing is subject to this same rule. Cooper-Smith v. Palmateer, 397 F.3d 1236,
23 1241 (9th Cir. 2005); Holland v. Jackson, 542 U.S. 649, 652, 124 S.Ct. 2736 (2004). The Ninth
24 Circuit has not yet decided whether requests for discovery fall within the ambit of § 2254(e)(2).
25 However, the reasoning of Cooper-Smith and Holland is equally applicable to discovery requests
26 as they are designed to develop evidence on the merits of a claim.

1 If a petitioner “failed to develop the factual basis for a claim” in state court, the
2 federal court “shall not hold an evidentiary hearing on the claim” unless the petitioner can show
3 that one of two narrow exceptions is applicable. 28 U.S.C. § 2254(e)(2). Whether a petitioner
4 failed to develop a claim in state court turns on whether the petitioner exhibited a lack of
5 diligence or some greater fault in state court. Williams v. Taylor, 529 U.S. 420, 421, 120 S.Ct.
6 1479 (2000). Ordinary diligence requires that petitioner seek an evidentiary hearing in state court
7 in the manner prescribed by state law. Williams v. Taylor, 529 U.S. 420, 437, 120 S.Ct. 1479
8 (2000). Under California law, an appellate court, when presented with a state habeas petition,
9 determines whether an evidentiary hearing is warranted only after the parties file formal
10 pleadings, if they are ordered to do so. Horton v. Mayle, 408 F.3d 570, 582 n.6 (9th Cir. 2005).
11 If the state court denies the petition without ordering formal pleadings, the case never reaches the
12 stage where an evidentiary hearing/discovery must be requested and the petitioner’s failure to
13 request a hearing in state court does not trigger § 2254(e)(2). Id.

14 In the instant case, petitioner requested an evidentiary hearing in his habeas
15 corpus petition filed in the California Supreme Court. See Exhibit A attached to petitioner’s
16 reply to respondent’s opposition to motion for discovery. The California Supreme Court denied
17 petitioner’s state habeas petition raising the at-issue claim without ordering formal pleadings.
18 Because petitioner did not reach the stage of the proceedings at which an evidentiary
19 hearing/discovery should be requested, he has not shown a lack of diligence at the relevant stages
20 of the state court proceedings and is not subject to the restrictions set forth in § 2254(e)(2).

21 Accordingly, although petitioner’s habeas petition is governed by the Anti-
22 Terrorism and Effective Death Penalty Act (AEDPA), which limits a district court’s discretion in
23 conducting evidentiary hearings and discovery, see 28 U.S.C. § 2254(e)(2), this court assesses
24 the availability of an evidentiary hearing/discovery under pre-AEDPA law because petitioner
25 exercised sufficient diligence in seeking to develop the factual basis of his claim in state court.
26 Williams v. Taylor, 529 U.S. 420, 437, 120 S.Ct. 1479 (2000).

1 “Under pre-AEDPA law, a habeas petition is entitled to an evidentiary hearing
2 [and discovery] on a claim where the facts are in dispute if 1) he has alleged facts that, if proven
3 would entitle him to relief; and 2) he did not receive a full and fair evidentiary hearing in state
4 court.” See Silva v. Calderon, 279 F.3d 825, 853 (9th Cir. 2002).

5 In Schriro v. Landrigan, ___ U.S. ___, 127 S.Ct. 1933, 1940 (2007), the Supreme
6 Court recently added another consideration in granting evidentiary hearings. The Supreme Court
7 held that “[b]ecause the deferential standards prescribed by § 2254 control whether to grant
8 habeas relief, a federal court must take into account those standards in deciding whether an
9 evidentiary hearing is appropriate.” 127 S.Ct. at 1940. Accordingly, “[i]t follows that if the
10 record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district
11 court is not required to hold an evidentiary hearing.” Id.

12 However, Landrigan also recognized that “[i]n cases where an applicant for
13 federal relief is not barred from obtaining an evidentiary hearing under § 2254(e)(2), the decision
14 to grant such a hearing rests in the discretion of the district court. Id. at 1937. This is so because
15 AEDPA “has not changed” the “basic rule” from before the enactment of AEDPA that “the
16 decision to grant an evidentiary hearing was generally left to the sound discretion of district
17 courts.” Id. at 1939.

18 In the instant case, petitioner did not receive an evidentiary hearing or discovery
19 as to the at-issue claim. Accordingly, the court next considers whether petitioner has alleged
20 facts which, if proven, would entitle him to relief and, pursuant to Landrigan, whether the
21 record refutes his allegations or precludes relief.

22 Based on the record, the court does not find that the trial court in this case failed
23 to undertake a sensitive inquiry into such circumstantial and direct evidence of intent as was
24 available. Green, supra. The trial court’s finding that the prosecutor’s motive was race-neutral
25 and not a pretext for racial discrimination is supported by the record. Petitioner does not argue
26 that the record before the trial court contained any evidence suggesting that the prosecutor failed

1 to strike white jurors based on their religious views. See Green, supra, (the Ninth Circuit cited
2 portions of the voir dire demonstrating that the prosecutor failed to strike white jurors with
3 similar backgrounds to the stricken African American juror). Petitioner does not argue, for
4 example, that the questionnaires of any white jurors indicated a religious background similar to
5 that of Mr. Hubbard.³

6 In addition, the prosecutor's reason for striking Mr. Hubbard was supported by the
7 record. In other words, the facts in the record were not objectively contrary to the prosecutors
8 reason for striking him. See McClain v. Prunty, 217 F.3d 1209, 1221 (9th Cir. 2000) ("Where
9 the facts in the record are objectively contrary to the prosecutor's statements, serious questions
10 about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.")
11 In fact, the first questions the prosecutor asked Mr. Hubbard concerned his religious background.

12 Because the direct and circumstantial evidence cited above supported the
13 prosecutor's race neutral reason for striking Mr. Hubbard, the trial court was not required to look
14 further than it did in evaluating petitioner's Wheeler motion. In other words, the circumstances
15 did not require the trial court to review the prosecutor's notes on the jury questionnaires. "The
16 trial judge had the unique opportunity to observe the demeanor of the prosecutor as [s]he justified
17 the peremptory strike, as well as [Mr. Hubbard] as [he] interacted with counsel during voir dire."
18 Williams v. Rhodes, 354 F.3d 1101, 1109 (9th Cir. 2004). For these reasons, petitioner's Batson
19 racial claim as to Mr. Hubbard is without merit.

20 Because the record precludes habeas relief, petitioner is not entitled to discovery
21 as to this claim. The court also will not exercise its discretion to permit the requested discovery.
22 Because the denial of this claim by the California Supreme Court was not an unreasonable
23 application of clearly established authority, this claim should be denied.

24
25 ³ In the pending discovery motion, petitioner seeks only the prosecutor's notes from the
26 jury questionnaires. Because the motion does expressly request the questionnaires, the court
presumes that petitioner's counsel has access to them.

1 Turning to potential juror Mr. Wade, during voir dire petitioner's counsel asked
2 him regarding the burden of proof in a criminal case:

3 Defense counsel: And you indicated on your questionnaire, that you felt that you
4 would require more in a murder case than any other type of criminal offense?

5 Wade: There would have to be definite proof.

6 Defense counsel: What I need to ask you is their burden is beyond a reasonable
7 doubt. The law does not allow any jury to find a person guilty with less proof and
8 does not allow jurors to require more than the law does.

9 Now, his Honor will later explain exactly what the law is of reasonable doubt.
10 Once he does that, will you be able to follow the law and only hold them to their
11 burden and not require some?

12 Wade: I would be able to pull it along, but this is within my interpretation.

13 Defense Counsel: Sometimes we feel that we do one thing rather than another.
14 The law says we only can do one thing.

15 Wade: Correct.

16 Defense Counsel: Are you going to be able to set aside what you like it to be and
17 what your personal feelings are as a standard of proof and follow the law?

18 Wade: Well, yeah, I follow the law, as I understand it.

19 Reporter's Augmented Transcript, Volume II, pp. 15-16.

20 The prosecutor asked Mr. Wade about his views concerning domestic violence
21 and the standard of proof:

22 Prosecutor: Mr. Wade, good afternoon.

23 Wade: Good afternoon.

24 Prosecutor: I had a similar question as the one that I talked with Mr. Breen about
25 that, is that alternative prospective juror Number 19, that is, with your opinion
26 with respect to domestic violence cases should be handled in criminal court.

Wade: Well, I don't think all of them should be. Because it's different, and what
you are doing is actually putting a tag on somebody.

Prosecutor: What do you mean, putting a tag?

Wade: You are making a criminal out of him for a minor offense.

1 Prosecutor: Okay. In your mind what would you define as being minor?

2 Wade: Well, arguments between a spouse.

3 Prosecutor: Uh-huh?

4 Wade: Nobody gets hurt. They are just talking back and forth and causing a little
5 commotion. Police comes in, they take somebody to jail.

6 Prosecutor: As I explained to Mr. Breen, and so just so I can ask you if your
7 opinion is the same in order to be brought to criminal court, there has to be as
8 assault, so a hit?

9 Wade: Oh.

10 Prosecutor: Okay. There has been an assault. Arguing, that happens all the time.
11 So that's not criminal conduct. It has to be an assault, some kind of blow, slap,
12 that kind of thing. Does that change, do you believe, those types of cases?

13 Wade: Not all of them, because there are different degrees. And somebody may
14 grab somebody and somebody may touch somebody, that's considered an assault.

15 Prosecutor: Okay. So would you agree with Mr. Breen that could be handled
16 more properly in family court?

17 Wade: Rehabilitation would be the best thing, counseling, rehabilitation, family
18 court, anything but give them a criminal record.

19 Prosecutor: Your niece's husband who was a Captain at the Harrisburg Police
20 Department?

21 Wade: Yes.

22 Prosecutor: Is he currently.

23 Wade: No, he's retired.

24 Prosecutor: Did you have much contact with him when he was?

25 Wade: No.

26 Prosecutor: A captain?

Wade: No.

Prosecutor: What about the question I've been asking whether or not I think Mr.
Odbert touched on it, whether on a murder case you would require more proof
than proof beyond a reasonable doubt?

Wade: I would require definite proof, yes, in order to convict somebody of
murder.

1 Prosecutor: Right, proof beyond a reasonable doubt there has to be a presentation
2 or evidence?

3 Wade: Right.

4 Prosecutor: A lot of evidence, and then the jury deliberates and they have to
5 decide whether that evidence proves beyond a reasonable doubt. So a juror cannot
6 have a reasonable doubt and convict, you see what I am saying? If a juror has a
7 reasonable doubt, they have to acquit.

8 Wade: Right, if I have a reasonable doubt, then that's the way I would vote.

9 Prosecutor: The instruction is not that it's any doubt. I don't have to prove doubt,
10 any doubt. It's there is like it doesn't have to be one hundred percent. Just
11 reasonable, you agree with that?

12 Wade: I can agree with that.

13 Prosecutor: Okay. Let me ask you, you talk about some family members that have
14 been charged with crimes?

15 Wade: Sure.

16 Prosecutor: And without going into it, do you believe that the system treated these
17 individuals fairly?

18 Wade: Well, they were guilty. Let me put it that way, what they were convicted
19 of. But whether the system treats them fairly, treats everybody, fairly, no I don't
20 believe that.

21 Prosecutor: What do you mean?

22 Wade: In other words, I believe the system warehouses people more than they are
23 trying to rehabilitate them.

24 Id. at 17-20.

25 After the prosecutor exercised a peremptory challenge as to potential juror Mr.
26 Wade, defense counsel made a Wheeler motion. Id. at 22-24. The trial court found that a prima
facie case of discrimination had been made. Id. at 24. The prosecutor then explained why she
had excused Mr. Wade:

So in the entire panel of jurors who were ultimately questioned, Mr. Wade
happened to be the only African-American.

He stated initially in his questionnaire that he would require more proof. Upon
further questioning, though he did resolve that he would follow the law with proof

1 beyond a reasonable doubt.

2 The People's concerns arose in two areas. The first being not a[s] significant as
3 the second area. The first area of concern though was his feelings about domestic
4 violence and what it boils down to, he, as he felt even in minor cases of assault,
5 those belonged in family court and shouldn't be in criminal court. And if I
6 remember correctly, he stated he didn't think somebody should be "tagged" as a
7 criminal. He did use the term "tagged," put a tag on somebody.

8 The biggest concern was when I talked with him about his relatives and he has a
9 brother, a nephew and he's put down "cousins" in the plural, his questionnaire,
10 that being question number 13 on page four, they were convicted of possession of
11 drugs.

12 When I asked him if he felt that the system treated those individuals fairly, he said
13 he didn't think they should be serving time. He used the word they shouldn't be
14 "warehoused." He didn't believe they should be going to prison. There has not
15 been a single juror in this panel, that is on the jury or a single person we
16 questioned who has ever brought up a concern about a person being in jail.
17 Almost of everybody who has had a relative who has been involved or been
18 charged with a crime and convicted had no problem with the way it was resolved,
19 that the person either served jail time; but Mr. Wade used the word "warehoused."
20 He felt it would be better for all of these individuals, we are talking four family
21 members, to be rehabilitated.

22 My concern is that Mr. Wade would not want to quote, "tag" the defendant as a
23 criminal, would not want to see him "warehoused" and will be more concerned
24 with his being rehabilitated.

25 Id. at 24-26.

26 Petitioner's counsel argued in reply:

Yes, your Honor. I'd like to place on the record that Mr. Wade was referring to
cousins who had been convicted of narcotics offenses, not any assaultive
behavior.

And he wasn't asked about specifically do you think people who are convicted of
murder should be sent to jail or to rehabilitation. I think he was purposefully not
asked that. I mean it's a thought process that people who are convicted of drug
offenses can be rehabilitated. That's why we passed Proposition 36, because it is
a common way of thinking because it is the truth, not all drug offenders need to be
"warehoused." And I believe that that's what Mr. Wade was referring to and is
referring to his cousins' offense, which is a drug offense, and he was being honest.
And he was not saying that he didn't feel that other persons are convicted of other
types of crime should all need rehabilitation. He indicated some people should do
time. That's what I heard him say.

Id. at 26-27.

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The prosecutor responded,

Well, I think that's an inference that could be drawn from what he said, that he thinks only drug offenders should be "warehoused" because he did say when discussing whether or not a domestic violence assault belongs in criminal courts, he said I don't think everybody who is involved in minor domestic violence assaults should be quote "tagged" a criminal. That concerned me greatly.

Id., p. 27.

The court denied the Wheeler motion:

In considering this motion, I've gone through all of the questionnaires of all of the jurors who remain in the box. There are eleven of them, and all of them have given what is the legally correct answer to question 26 on page 8, "Would you require either more or less proof to convict someone of murder than what you would require if the charge were something else?" They have all stated in one way or another that they would not or it's all the same.

And that is at odds with Mr. Wade's initial statement. But everyone else who has expressed some reservations about the burden of proof has been excused by one side or the other.

Insofar as the prosecution's exercise of challenges, which is the subject of this inquiry and the scrutiny, Mr. Wade's attitude on domestic violence is different than what the law is. His attitude toward punishment is different than what the law is. His feelings about rehabilitation, particularly, given the facts and circumstances of this case, I think it's reasonable to assume that they could come into play and make it difficult for him to find that the burden of proof had been met if, in fact, other jurors are going to find that it has been.

And so I think those provide a sufficient race neutral basis for exercise of the challenge. And so I will deny the Wheeler motion as to Mr. Wade.

And, also, I think I need to make a finding that insofar as Mr. Wade and I believe the other gentleman is Mr. Hubbard, that this does not show a pattern that adequate explanations have been given for each challenge. So a pattern has not been established. So the Wheeler motion is denied.

Id. at 29-31.

Based on the record, the court does not find that the trial court in this case failed to undertake a sensitive inquiry into such circumstantial and direct evidence of intent as was available regarding the Wheeler challenge to potential juror Wade. Green, supra. The trial court's finding that the prosecutor's race neutral reason was not a pretext for discrimination was supported by the record. The trial court reviewed the jury questionnaires and found that the

1 jurors left in the jury box had indicated that they would apply the correct standard of proof, in
2 contrast to Mr. Wade's suggestion that he might require more proof. The trial court also found
3 that everyone else who had expressed reservations about the burden of proof had also been
4 dismissed. Petitioner does not argue that these findings by the trial court were incorrect.

5 In addition, the prosecutor's reason for striking Wade was supported by the
6 record. In other words, the facts in the record were not objectively contrary to the prosecutors
7 reason for striking him. See McClain v. Prunty, supra.

8 After independently reviewing the record, the court finds that the denial of this
9 claim by the California Supreme Court was not an unreasonable application of clearly established
10 authority, his motion for discovery is denied. For the same reasons, this claim should be denied.

11 D. Claim 4: Jury Instruction Error

12 Petitioner argues that the trial court should have sua sponte given CALJIC 3.40
13 defining proximate cause. The California Court of Appeal denied this claim for the following
14 reasons:

15 Defendant contends the trial court erroneously instructed on causation.

16 The trial court gave the following instructions on causation:

17 "[CALJIC No.] 8.55 [:] To constitute murder or manslaughter there must be, in
addition to the death of a human being, an unlawful act which was a cause of that
death.

18 "[CALJIC No.] 8.56 [:] It is not a defense to a criminal charge that the deceased
19 or some other person was guilty of negligence, which was a contributory cause of
the death involved in this case.

20 "[CALJIC No.] 8.57[:] Where the original injury is a cause of the death, the fact
21 that the immediate cause of death was the medical or surgical treatment
administered or that the treatment was a factor contributing to the cause of death
22 will not relieve the person who inflicted the original injury from responsibility.

23 "Where, however, the original injury is not a cause of the death and the death was
caused by medical or surgical treatment or some other cause, then the defendant is
24 not guilty of an unlawful homicide."

25 Defendant does not criticize these instructions. Rather, he argues that the trial
court should have instructed with CALJIC No. 3.40 so as to further define
26 proximate cause. [Footnote 5]

[Footnote 5: CALJIC No. 3.40 provides in part: “The criminal law has its own particular way of defining cause. A cause of [death] is an act...that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act...the [death,] and without which the [death] would not occur.”]

Defendants’ argument is therefore that each proximate cause instruction actually given was incomplete because it did not adequately define proximate cause. However, as defendant acknowledges, CALJIC 3.40 was originally requested but was withdrawn. The record does not reveal which party requested it, or why it was withdrawn. A party contending that an instruction that is otherwise correct [sic] is incomplete has a duty to object to the instructions given or request a clarifying instruction in the trial court; otherwise, the claim is forfeited on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622.) Because the record fails to show that defendant objected to the causation instructions given or requested a clarifying instruction, his claim of instruction error has been forfeited. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 113.)

Opinion of California Court of Appeal, pp. 16-18.

Respondent argues that this claim is procedurally barred for the reasons stated by the California Court of Appeal above, i.e. his failure to request this instruction. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590 (1991) (applying the look through doctrine).

Petitioner has not met his burden of challenging the adequacy of the bar discussed by the California Court of Appeal by showing it is inconsistently applied. *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). In the reply to the answer, petitioner argues that the court should disregard respondent’s claim that the issues are forfeited due to counsel’s failure to object to the instructions. Reply, p. 4: 16-18. Petitioner argues that respondent has not met his burden under *Bennett*, *supra*. *Id.* The court disagrees. Respondent met his burden under *Bennett* by pleading petitioner’s failure to satisfy a state procedural bar. 322 F.3d at 586.

If there is an independent and adequate state ground for the decision, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. *Harris*, 489 U.S. at 262, 109 S. Ct. at 1043.

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1 In order to evaluate whether petitioner was prejudiced by the trial court's failure
2 to read the proximate cause instruction sua sponte the court will discuss the evidence presented
3 regarding the cause of Marcel's death.

4 The California Court of Appeal found that there was sufficient evidence that
5 petitioner caused Marcel's death:

6 Defendant contends there was insufficient evidence to support his conviction for
7 murder because the People failed to prove defendant's conduct caused Marcel's
8 death, which occurred due to "natural causes ... nearly one month after he was
born." We conclude there is sufficient evidence that defendant's conduct caused
Marcel's death.

9 We review insufficient-evidence contentions in criminal cases by viewing the
10 evidence in the light most favorable to the judgment and deciding whether there is
substantial evidence from which a reasonable trier of fact could have found the
11 essential elements of the crime proved beyond a reasonable doubt. (People v.
Staten (2000) 24 Cal.4th 434, 460, 101 Cal.Rptr.2d 213, 11 P.3d 968; People v.
12 Johnson (1980) 26 Cal.3d 557, 576, 162 Cal.Rptr. 431, 606 P.2d 738.) If the
answer is affirmative, the possibility that the trier of fact might reasonably have
13 reached a different conclusion does not warrant reversal. (People v. Bean (1988)
46 Cal.3d 919, 932-933, 251 Cal.Rptr. 467, 760 P.2d 996.)

14 "The criminal law ... is clear that for liability to be found, the cause of the harm
not only must be direct, but also not so remote as to fail to constitute the natural
15 and probable consequence of the defendant's act." (People v. Roberts (1992) 2
Cal.4th 271, 319, 6 Cal.Rptr.2d 276, 826 P.2d 274.) In determining whether a
16 defendant's acts were the proximate cause of the death of a human being, we ask
whether the evidence sufficed to permit the jury to conclude that the death was the
17 natural and probable consequence of defendant's act. (Id. at p. 321, 6 Cal.Rptr.2d
276, 826 P.2d 274.) As we shall explain, the evidence adduced at the trial of this
18 case satisfies this test.

19 Defendant points to the evidence that medical science does not know for certain
what causes necrotizing intercolitis, that the condition can occur in full-term
20 babies, that it is less likely to occur fatally in babies born at 28 weeks than in
those born two or three weeks younger, and that Marcel's Down's
21 syndrome-related heart defect carried a measurable risk of mortality even if he had
been delivered at term.

22 Although defendant does not fully spell it out, we take his argument to be that
23 Marcel's preexisting heart defect could have been the sole cause of death because
it rendered him vulnerable to necrotizing intercolitis regardless of the
24 circumstances of his birth, and that the prosecution did not prove the contrary
beyond a reasonable doubt. Defendant cannot hope to prevail merely by arguing
25 the heart defect was a contributing cause of death: even if true, this claim would
not relieve him of responsibility for his own acts. (See People v. Phillips (1966)
26 64 Cal.2d 574, 577-579, 51 Cal.Rptr. 225, 414 P.2d 353; People v. Scola (1976)

56 Cal.App.3d 723, 726, 128 Cal.Rptr. 477.)

Contrary to defendant's position, the jury here could reasonably have concluded that Marcel's death was the natural and probable consequence of defendant's punching Garvon White. It was undisputed that defendant's assault on White forced the immediate and grossly premature delivery of Marcel. It was also undisputed that from the time of his birth to the time of his death, Marcel suffered from debilitating conditions caused by his prematurity and which would not have existed but for the prematurity. The immediate cause of Marcel's death, necrotizing intercolitis, is almost never seen except in premature babies. Dr. Ezzedeen, the main prosecution expert on that point, had seen over 100 cases, but not one in a baby born at full term.FN4 Dr. Ezzedeen and Dr. Reiber explained how the many forms of vulnerability a premature infant experiences can expose him to necrotizing intercolitis. Dr. Reiber also testified to other forms of injury Marcel had incurred before his death arising out of those same vulnerabilities. Altogether, this evidence constituted an overwhelming showing that defendant's assault on White was the proximate cause of Marcel's death.

FN4. Defendant cites the testimony of Dr. Reiber, the forensic pathologist, that the condition can happen in full-term infants. Dr. Reiber gave no evidence as to the probability or frequency of such an occurrence, however. Thus his testimony did not contradict that of Dr. Ezzedeen.

On the other hand, there was no substantial evidence to support the claim that Marcel's heart defect would have caused his death if he had not been born almost two months prematurely. Although there was evidence that it would have increased his risk of mortality by a small percentage if he had been born at full term, there was no evidence that it would have increased his risk of developing necrotizing intercolitis under those circumstances. There was only the skimpiest evidence that full-term babies can develop that condition (an undeveloped allusion to the medical literature, with no showing as to probability or frequency). And there was no evidence whatever that any full-term baby has ever died of that condition.

But even if the jury could have concluded that Marcel's preexisting heart defect contributed to his death, that would not have relieved defendant of his responsibility for the death. As the courts have made clear, a defendant whose infliction of physical injury upon another is a cause of that person's death is guilty of unlawful homicide even if the injury was not the only cause of death, and even if the victim was in a weakened state due to a preexisting condition. (*People v. Phillips*, supra, 64 Cal.2d at pp. 577-579, 51 Cal.Rptr. 225, 414 P.2d 353; *People v. Stamp* (1969) 2 Cal.App.3d 203, 207-209, 82 Cal.Rptr. 598; see CALJIC No. 8.58.) Although the first victim of physical injury from defendant's act was Garvon White, Marcel was the ultimate victim of that injury, in that the premature delivery it forced rendered him vulnerable to the condition that killed him.

Substantial evidence supports the jury's conclusion that defendant caused the death of Marcel Taylor.

1 This court has also reviewed the record and will set forth some of the relevant
2 testimony regarding causation. Dr. Ezzedeen, the neonatologist at Sutter Memorial Hospital who
3 cared for Marcel, testified that Marcel developed necrotizing intercolitis (NEC). RT at 427. In
4 his practice, NEC was more common in premature babies, like Marcel. RT at 438. Prematurity
5 was the most important risk factor for NEC. RT at 439. Dr. Ezzedeen testified that Marcel's
6 other complications, i.e. Down's syndrom and his heart defect, were not directly related to his
7 death. RT at 439-440. He testified that, "I suppose it could carry some risk factors in the
8 development of NEC, but it is not a type of heart defect that is known to cause selectively
9 decreased blood flow to the intestinal tract." Id. He also testified that had Marcel been born at
10 term,

11 Well, basically, he would not have the breathing problems that he had due to his
12 lung immaturity. That's one thing that can be probably not to worry about had he
born term.

13 Second, the management of his heart problems would have been a little bit easier.

14 Third, NEC is extremely uncommon in term babies. If you add these factors, you
15 know, one can speculate maybe management would have been a lot easier for his
Down's and heart condition had he been born term.

16 RT at 440.

17 On cross-examination, Dr. Ezzedeen testified that one could not really exclude
18 that Marcel's heart problem was a risk factor for the development of NEC. RT at 445. On re-
19 direct he went on to testify:

20 Q: So would baby—I mean, given what you know about his heart defect, if he had
21 been born to term, would he have been at a risk for NEC?

22 Petitioner's Counsel: Objection; calls for speculation.

23 Court: Overruled. You can answer.

24 A: It would be a far greater, far lower risk for NEC, significantly lower.

25 Q: Significantly lower risk?

26 A: But theoretically, it's possible.

RT at 464.

1 Dr. Reiber, the doctor who performed the autopsy of Marcel, testified that he died
2 “basically as a result of complications of prematurity and with a complicating factor of a
3 congenital heart defect known as common atrial ventricular canal.” RT at 471. But, “ultimately
4 he died as a result of infectious complication of necrotizing intercolitis.” RT at 482. When asked
5 whether Marcel’s heart defect had any direct role in his death, Dr. Reiber testified,

6 I don’t know I would say direct. I think it played a role in increasing his risk for
7 various complications of his prematurity, including the necrotizing intercolitis.
But I think by itself would not have caused his death.

8 RT at 482.

9 When asked if Marcel would have lived had he been born to term with the
10 Down’s syndrome and its linked congenital heart defect, Dr. Reiber answered,

11 I think his chances would have been very good. This particular type of heart
12 defect is not associated with a high mortality rate in and of itself. The mortality
13 rate is probably in the five to six percent range for this particular problem. And so
his chances of survival would have been very high.

14 RT at 484.

15 Dr. Reiber testified that the “proximate cause” of Marcel’s death was NEC:

16 Q: Doctor, Marcel didn’t die from prematurity, he died from the complications of
17 necrotizing intercolitis, did he not?

18 A: Well, in terms of an immediate cause of death, yes. But, in my opinion, his
19 proximate cause, proximate cause of death goes back to the prematurity, a primary
factor leading to the NEC.

20 RT at 484.

21 Petitioner suggests, as did his counsel at trial, that Marcel’s heart defect
22 contributed to if not caused his death, rather than his premature birth caused by petitioner.
23 However, it is clear from the testimony of Dr. Ezzedeen and Dr. Reiber that Marcel died from
24 NCS, caused by his premature birth. Dr. Ezzedeen testified that Marcel’s heart disease was not
25 the type of heart defect known to cause selectively decreased blood flow to the intestinal tract,
26 thus leading to NCS. Dr. Reiber testified that had Marcel been born to term, his chance of

1 survival, despite his heart defect, was very good.

2 CALJIC No. 3.40 provides that, “a cause of [death] is an act...that sets in motion a
3 chain of events that produces as a direct, natural and probable consequence of the act...the
4 [death,] and without which the [death] would not occur.” Based on the reasoning of the
5 California Court of Appeal and the testimony set forth above, this court finds that there was more
6 than sufficient evidence that petitioner proximately caused the death of Marcel. For this reason,
7 petitioner was not prejudiced by the trial court’s failure to read this instruction sua sponte. Nor
8 did any violation of fundamental fairness occur as a result of the failure to read this instruction.
9 Accordingly, this claim should be denied as procedurally barred.

10 E. Claim 5: Jury Instruction Error

11 Petitioner alleges that the trial court erroneously gave CALJIC 8.51. The
12 California Court of Appeal denied this claim for the following reasons:

13 Defendant contends the trial court erred by instructing the jury pursuant to
14 CALJIC No. 8.51: “If a person causes another’s death while committing a felony
15 which is dangerous to human life, the crime is murder. If a person causes
16 another’s death while committing a felony that is not inherently dangerous, but
17 which is dangerous to human life under the circumstances of its commission, the
18 crime is involuntary manslaughter.” According to defendant, this instruction,
19 which differentiates between second degree felony murder liability is not an issue
20 because it erroneously permits the jury to find guilt based on a felony murder
21 theory rather than a finding of malice. Defendant further contends that the trial
22 court’s error must be reviewed under the Chapman [footnote] standard because it
23 withdrew the issue of malice, an essential element

19 [footnote: Chapman v. California (1967) 386 U.S. 18 [17 L.Ed.2d 705]
20 (Chapman).]

21 of murder, from the jury’s consideration, or because it set up a conflict with other
22 instructions going to that issue. (See People v. Maurer (1995) 32 Cal.App.4th
23 1121, 1128.) Defendant has not shown grounds for reversal on this point.

23 CALJIC No. 8.51 should not be given in a second degree felony murder
24 prosecution in which the felony has “merge[d]” with the homicide.” (See People
25 v. Hansen (1994) 9 Cal.4th 300, 316.) However, as we shall explain, this case
26 was not prosecuted as a felony murder case, and the jury could not reasonably
have believed that it could convict defendant on a felony murder theory. Thus,
even assuming the instruction should not have been given, the error is harmless
under the Chapman standard.

1 The information alleged as to count 1 that defendant committed murder, acting
2 with malice aforethought. The jury was correctly instructed on the definitions of
3 murder and malice aforethought (CALJIC Nos. 8.10, 8.11); the various forms of
4 unlawful homicide, not including felony murder (CALJIC Nos. 8.20, 8.30, 8.31,
5 8.37, 8.40, 8.42, 8.43, 8.44, 8.45, 8.46, 8.50); and the concurrence of act and
6 specific intent as to count 1 (CALJIC No. 3.11).

7 Moreover, the jury heard the testimony of Garvon White and the numerous
8 witnesses to whom she had told her story before trial that defendant said, as he
9 punched her multiple times in the stomach, that he did not want the baby and did
10 not want White to have the baby, and/or that he wanted to kill the baby—evidence
11 fitting only a theory of malice aforethought. The prosecutor stressed this
12 testimony in closing argument:

13 “We submit to you, ladies and gentlemen, that the most accurate statements from
14 Garvon White occurred before she began her attempt to protect him. So what
15 statements are those? Those are the statements to the responding officer, Officer
16 Benton, who she tells, he hit me six times in the stomach, said he didn’t want me
17 to have his baby. She told the paramedic that he hit her multiple times in the
18 stomach...To Dr. Wong, again, she said multiple times she was hit to the stomach.
19 To Alisa Kistler, that she was hit six times to the stomach. And to the social
20 worker, Laura Barman Murray, [to] who[m] she explained he said he wanted to
21 kill my baby. [¶]...[¶]...She told Detective Rankin the defendant hit her six times
22 in the stomach while she was on the floor trying to protect the baby. He yelled as
23 he hit her, I don’t want the baby, don’t want the, quote, ‘bitch,’ to have this baby.”

24 The prosecutor also clearly explained the difference between murder and
25 manslaughter—the presence or absence of malice aforethought—and the reasons
26 why defendant could not properly be found to have committed the lesser of these
offenses: the number and force of the blows he struck and the words he spoke as
he struck them, showing an intent to kill or a conscious disregard for life plus an
action naturally dangerous to the life of the ultimate victim, combined with a lack
of any legally sufficient provocation and heat of passion or unreasonable self-
defense to reduce the offense to manslaughter. The prosecutor never argued for
second degree murder on a felony murder theory.

Furthermore, there was no evidence that the assault took place in any way other
than that which White described before and during trial: a targeted attack on the
fetus, accompanied by outbursts of murderous rage toward it (along with the
“bitch” who was carrying it.) The jury could not reasonably have found that
defendant merely beat White without intending the fatal result that ultimately
followed.

For all these reasons, even if the trial court should not have given CALJIC 8.51,
there is no reasonable possibility that defendant would have obtained a better
outcome without that instruction. Therefore, any error was harmless beyond a
reasonable doubt. (*Chapman, supra*, 386 U.S. 18, 24, [17 L.Ed.2d at pp. 710-
711].)

1 After finding that the trial court erred in giving CALJIC No. 8.51, the California
2 Court of Appeal found the error to be harmless, applying the standard set forth in Chapman v.
3 California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967).

4 For the reasons stated by the California Court of Appeal, this court finds that the
5 state appellate court's finding that the trial court erred in giving CALJIC No. 8.51 was not an
6 unreasonable application of clearly established Supreme Court authority. However, this court
7 must still determine whether the error was harmless within the meaning of Brecht v.
8 Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993). Fry v. Pliler, ___ U.S. ___, 127 S.Ct. 2321,
9 2327-28 (2007) (noting that AEDPA "sets forth a precondition to the grant of habeas relief..., not
10 an entitlement to it," and that "in § 2254 proceedings a [federal] court must assess the prejudicial
11 impact of constitutional error in a state-court criminal trial under the 'substantial and injurious
12 effect' standard set forth in Brecht"). "Brecht applies "whether or not the state appellate court
13 recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable
14 doubt' standard set forth in Chapman." Id. at 2328.

15 In other words, a federal habeas court technically applies Brecht in light of
16 AEDPA, but because the Brecht test is stricter (i.e., tougher on the petitioner) than
17 AEDPA/Chapman, any petitioner that meets the Brecht standard will necessarily
18 meet the AEDPA/Chapman standard. Thus, when conducting harmless-error
review, we simply apply the Brecht standard and ask whether [the petitioner] has
shown that the error had substantial and injurious effect in determining the jury's
verdict.

19 Wilson v. Mitchell, 498 F.3d 491, 503 (6th Cir. 2007).

20 Based on the reasoning of the California Court of Appeal, this court finds that the
21 reading of CALJIC 8.51 did not have a substantial and injurious effect on the jury's verdict.
22 Accordingly, this claim should be denied.

23 F. Claim 6: Batson

24 Petitioner argues that the prosecutor's challenge to prospective juror Hubbard
25 based on his religious affiliation violated Batson v. Kentucky, supra. The California Court of
26 Appeal found that this claim was barred because petitioner did not raise this argument at trial.

Opinion of California Court of Appeal, pp. 21-22. Respondent argues that this claim is procedurally barred for the reasons stated by the California Court of Appeal above. Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590 (1991).

After reviewing the traverse, the court finds that petitioner has not met his burden of challenging the adequacy of the bar discussed by the California Court of Appeal by showing it is inconsistently applied. Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003). The court also finds that petitioner has not demonstrated cause for the default and actual prejudice resulting from the alleged violation of federal law, or a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S. Ct. at 1043. This is because the United States Supreme Court has not extended Batson to challenges based on religion, or even specific religious affiliation.

We have never held that Batson applies to cases of religious discrimination in jury selection. [FN3] Even assuming, arguendo, that Batson does apply to claims of religious discrimination, we find no clear error in the district court's action. It is therefore unnecessary to resolve the open question of whether Batson does indeed apply to religious discrimination.

FN3. The Supreme Court has so far declined to resolve this issue. See Davis v. Minnesota, 511 U.S. 1115, 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994) (denial of certiorari in a case raising the issue). Some courts have made the distinction between one's religious affiliation and one's religious beliefs. See United States v. Brown, 352 F.3d 654, 669 (2d Cir.2003); United States v. DeJesus, 347 F.3d 500, 511 (3d Cir.2003) ("The distinction drawn by the District Court between a strike motivated by religious beliefs and one motivated by religious affiliation is valid and proper."); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir.1998) (noting in dicta that it might be "necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief").

United States v. Girouard, 521 F.3d 110, 114 (1st Cir. 2008).

Moreover, expanding "religion" to Batson challenges would be a dicey proposition. The separation between religion and life's philosophy are not clearly demarcated. In addition, certain religions may well have tenets at odds with the controlling law, e.g., drug use, participation in capital punishment proceedings. It could not be, for example, that one could be dismissed from a capital case jury because he would refuse to ever make a finding that someone was eligible for capital punishment, but to simply state that such was based on a religious belief would immunize

the juror from dismissal. Therefore, were the court to consider the merits of this claim, it could not be a violation of clearly established Supreme Court authority. For these reasons, this claim should be denied.

G. Claim 7: Vagueness–Murder

Petitioner argues that California law regarding murder is vague because it failed to give adequate notice to petitioner and members of the public that the crime of murder may be committed when an injury is inflicted in utero prior to the baby’s live birth.⁴

“[C]riminal statutes which fail to give due process that an act has been made criminal before it is done are unconstitutional deprivations of due process of law.” Jordan v. DeGeorge, 341 U.S. 223, 230, 71 S.Ct. 703 (1951). A statute is void for vagueness if it fails to define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited. Vlasak v. Superior Court of California, 329 F.3d 683, 688-89 (9th Cir. 2003). In a facial vagueness challenge, the court must look to the plain language of the statute, as well as construe the statute as it has been interpreted by state courts. Nunez by Nunez v. City of San Diego, 114 F.3d 935, 941-42 (9th Cir. 1997).

On appeal, petitioner raised his vagueness challenge, although phrased somewhat differently. The California Court of Appeal denied this claim for the following reasons:

Defendant contends he could not properly be convicted of murdering Marcel, “a human being,” because “[t]he fatal act ... occurred before Marcel was born.” He asserts that the issue turns on whether a fetus is considered a human being in the eyes of the criminal law. He then concludes that under section 187, which distinguishes between the murder of a fetus and the murder of a human being, he could properly have been convicted, if at all, only of the former offense.FN3 We disagree.

FN3. Section 187 provides as relevant:“(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

“(b) This section shall not apply to any person who commits an act that results in the death of a fetus if [it is a lawful therapeutic abortion].

⁴ Petitioner is not particularly clear in the amended petition as to what legal claim he is raising in claim 9. The court construes claim 9 to be raising a vagueness challenge.

1 “(c) Subdivision (b) shall not be construed to prohibit the prosecution of any
2 person under any other provision of law.”

3 As we shall explain, defendant's first premise is flawed. In defining the offense in
4 this case, the law looks to the instant of death, not to when defendant did the act
5 that ultimately caused death. Because Marcel was a human being when he died,
6 defendant's conviction for the murder of a human being was proper.

7 At common law, when a child was born alive but subsequently died due to
8 injuries inflicted before birth on the mother, the crime was murder or
9 manslaughter; if the child was born dead, there was no homicide. (1 Witkin &
10 Epstein, Cal.Criminal Law (3d ed. 2000) Crimes Against the Person, § 96, p. 712;
11 hereafter, Witkin & Epstein.) Section 187 did not modify that common law rule as
12 to live-born babies. (Id. at pp. 712-713.)

13 If a fetus is born alive after an attack on the mother but subsequently dies, it is a
14 human being at the time of death for purposes of the manslaughter statute. (§ 192;
15 People v. Dennis (1998) 17 Cal.4th 468, 505-506, 71 Cal.Rptr.2d 680, 950 P.2d
16 1035.) Unlike section 187, section 192 does not cover the killing of a fetus.
17 However, it would be illogical to conclude that once a fetus has been born it is a
18 human being for purposes of manslaughter but not for purposes of murder. The
19 only distinction between a manslaughter case and a murder case on such facts is
20 whether the defendant's attack on the mother was spurred by malice aforethought
21 toward the fetus. This distinction has no bearing on whether the victim is a human
22 being within the meaning of section 187.

23 We conclude that if (1) a defendant, acting with malice aforethought toward the
24 fetus in a woman's womb, assaults the woman; (2) in consequence, the fetus must
25 be delivered prematurely; and (3) the fetus is born alive but later dies of causes to
26 which the prematurity contributed substantially, the defendant has murdered a
human being. (§ 187, subd. (a); see People v. Dennis, supra, 17 Cal.4th 468,
505-506, 71 Cal.Rptr.2d 680, 950 P.2d 1035; 1 Witkin & Epstein, supra, § 96, pp.
712-713.)

Defendant asserts that such a construction of section 187 amounts to an
unacceptable “relation back” theory of culpability. Defendant is mistaken. As we
have shown, the law of manslaughter, as explained in People v. Dennis, supra, 17
Cal.4th 468, 71 Cal.Rptr.2d 680, 950 P.2d 1035, defines the defendant's crime by
the victim's status as a human being at the time of the victim's death, even if the
acts that proximately caused his death occurred before his birth. By analogy, so
should the law of murder. Nothing is “relat [ed] back”: the law simply takes the
victim as it finds him.

Defendant relies on Justus v. Atchison (1977) 19 Cal.3d 564, 139 Cal.Rptr. 97,
565 P.2d 122 (Justus) (disapproved on other grounds in Ochoa v. Superior Court
(1985) 39 Cal.3d 159, 171, 216 Cal.Rptr. 661, 703 P.2d 1), which held that under
California's wrongful death statute, triggered by the death of a “person” (Code
Civ. Proc., former § 377; see now § 377.60; Stats.1992, ch. 178, §§ 19-20), a
cause of action would not lie for the death of a stillborn fetus. His reliance is
misplaced.

In Justus, supra, 19 Cal.3d 564, 139 Cal.Rptr. 97, 565 P.2d 122, the court found that the Legislature had not expressly incorporated the definition of “an existing person” in Civil Code former section 29 (repealed by Stats.1993, ch. 19, § 2), which included a fetus, into the wrongful death statute, and held that the Legislature had thus impliedly excluded fetuses from the statute's coverage. (Justus, supra, at pp. 578-579, 139 Cal.Rptr. 97, 565 P.2d 122.) The court also noted that the Legislature had “specially identified the object of its concern,” either by express language or the incorporation of Civil Code former section 29, “in the limited instances in which the Legislature has extended the protection of the criminal law to the unborn child.” (Justus, supra, 19 Cal.3d at p. 579, 139 Cal.Rptr. 97, 565 P.2d 122.)

Defendant asserts Justus, supra, 19 Cal.3d 564, 139 Cal.Rptr. 97, 565 P.2d 122, in effect created a rule that criminal liability based on harm to a live child from “a prenatal act” can stem only from a statute analogous to Civil Code former section 29 or expressly incorporating it. He is wrong for several reasons.

First, the sole issue in Justus, supra, 19 Cal.3d 564, 139 Cal.Rptr. 97, 565 P.2d 122, was how to construe the wrongful death statute; thus the court's discussion of criminal law is dictum. Second, the court grounded its holding on the premise that the wrongful death cause of action, as a pure creature of statute, must be limited to the precise terms used by the Legislature (id. at p. 575, 139 Cal.Rptr. 97, 565 P.2d 122); by contrast, section 187 codifies the common law of murder and has not changed it in any material way. (See 1 Witkin & Epstein, supra, § 96, pp. 712-713.) Third, defendant has not shown that “human being” as used in section 187 is synonymous with “person” as used in the civil law, whether in the wrongful death statute (Code Civ. Proc., § 377.60) or in Civil Code former section 29. Lastly, as we have explained, the victim in this case was not an “unborn child” as the term is used in Justus.

Defendant also cites Reyes v. Superior Court (1977) 75 Cal.App.3d 214 at pages 218 through 219, 141 Cal.Rptr. 912 (Reyes), which held in reliance on Justus, supra, 19 Cal.3d 564, 139 Cal.Rptr. 97, 565 P.2d 122, that the alleged mistreatment of a fetus will not support a criminal prosecution for child endangerment (§ 273a). However, Reyes is distinguishable because the alleged criminal conduct constituting endangerment (the mother's use of heroin while pregnant), including the resulting harm (fetal addiction), was complete before the fetuses were born. (Reyes, supra, 75 Cal.App.3d at p. 216, 141 Cal.Rptr. 912.)

In conclusion, defendant has failed to show that he could not be convicted for the murder of a human being on the facts in this case.

Opinion of California Court of Appeal, pp. 8-12.

It appears to the undersigned that petitioner is more arguing that the Court of Appeal got the state law wrong (an impermissible argument in habeas corpus, Medley v. Runnels, 506 F.3d 857, 862 (9th Cir. 2007) (en banc)) as opposed to an argument that the statute is vague. Also, petitioner has not made a Bouie claim: unforeseeable state court interpretation of

1 a criminal statute violated due process, Bouie v. City of Columbia, 378 U.S. 347, 354-55, 84
2 S.Ct. 1967 (1964).

3 Based on the case law cited by the California Court of Appeal, this court finds that
4 a person of ordinary intelligence would understand that the crime of murder may be committed
5 when an injury is inflicted in utero prior to the baby's live birth. The denial of this claim by the
6 California Court of Appeal was not an unreasonable application of clearly established Supreme
7 Court authority. Accordingly, this claim should be denied.

8 H. Claim 8: Vagueness–Enhancement

9 Petitioner argues that California Penal Code § 12022.9(a) is unconstitutionally
10 vague because it failed to give adequate notice to petitioner and members of the public that the
11 enhancement generally applied to pregnancies resulting in live birth.

12 In addressing petitioner's claim that there was insufficient evidence to support this
13 enhancement, the California Court of Appeal addressed petitioner's related vagueness claim:

14 Defendant contends the jury's finding as to count 2 that he terminated White's
15 pregnancy is not supported by the evidence, because as a matter of law
16 "termination of ... pregnancy" as used in section 12022.9, former subdivision (a),
17 can only mean a miscarriage or an abortion.FN10 We conclude he has not
18 supported this contention.

18 FN10. Section 12022.9, former subdivision (a), in effect at the time of
19 trial, provided: "Any person who, during the commission or attempted
20 commission of a felony, knows or reasonably should know that the victim
21 is pregnant, and who, with intent to inflict injury, and without the consent
22 of the woman, personally inflicts injury upon a pregnant woman that
23 results in the termination of the pregnancy shall, in addition and
24 consecutive to the punishment prescribed by the felony or attempted
25 felony of which the person has been convicted, be punished by an
26 additional term of five years in the state prison. The additional term
provided in this subdivision shall not be imposed unless the fact of that
injury is charged in the accusatory pleading and admitted or found to be
true by the trier of fact. [¶] Nothing in this subdivision shall be construed
as affecting the applicability of subdivision (a) of Section 187 of the Penal
Code."The statute was later amended to delete former subdivision (b) and
renumbered without subdivisions, but not materially changed. (Stats.2002,
ch. 126, § 7.)

26 \\\

“ ‘ “We begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent. [Citation.]” [Citation.] “ ‘The court turns first to the words themselves for the answer.’ [Citations.]” [Citation.] When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature. [Citation.] [Citation.]” ‘ ‘ ” (People v. Statum (2002) 28 Cal.4th 682, 689-690, 122 Cal.Rptr.2d 572, 50 P.3d 355.)

The plain meaning of former section 12022.9 does not limit its application to cases of miscarriage or abortion. Moreover, defendant cites no authority so limiting the term “termination of pregnancy” in section 12022.9. Instead, he offers definitions of the term in unrelated statutes and case law, plus what he calls “an examination of probable legislative intent” devoid of any actual indicia of such intent. He also asserts that his preferred definition accords with the clear and unambiguous meaning of the term in ordinary usage, but again fails to provide any relevant authority for this claim-not even a dictionary definition. Legal contentions unsupported by apposite authority are waived. (Amato v. Mercury Casualty Co., supra, 18 Cal.App.4th 1784, 1794, 23 Cal.Rptr.2d 73.)

In Dennis, supra, 17 Cal.4th 468, 71 Cal.Rptr.2d 680, 950 P.2d 1035, the only published case thus far to address section 12022.9, the court noted: “As an enhancement, section 12022.9 does not represent an alternative to a charge of fetal murder in violation of section 187. Instead, it imposes an additional punishment for committing, or attempting to commit, a felony in a manner that intentionally injures a pregnant woman and results in termination of her pregnancy. The enhancement relates to the particular injury a defendant inflicts on a woman in committing the substantive crime.” (Dennis, supra, 17 Cal.4th at p. 501, 71 Cal.Rptr.2d 680, 950 P.2d 1035; italics added.) Although Dennis does not discuss the precise issue before us now, its reasoning is instructive.

Dennis, supra, 17 Cal.4th 468, 71 Cal.Rptr.2d 680, 950 P.2d 1035, teaches that the point of the enhancement is to punish the defendant for injuring a woman in a particular manner with a particular result, not for the particular harm that comes to the fetus she is carrying. Given this logic, the enhancement is properly imposed when the pregnancy “terminates”-i.e., ends-in any manner as a result of the defendant's intentional felonious act. If only a miscarriage or an abortion could constitute the “termination” of a pregnancy under this statute, the Legislature could have so specified. Here, defendant's assault on Garvon White ended her ongoing pregnancy two months prematurely by forcing the immediate delivery of her fetus through a C-section. Under the logic of Dennis, and applying the plain language of the statute, we conclude that the enhancement was supported by the evidence.

Opinion of California Court of Appeal, pp. 30-33.

Based on the reasoning of the California Court of Appeal, this court finds that a person of ordinary intelligence would have understood that Cal. Penal Code § 12022.9(a) applied to pregnancies resulting in live birth. The plain language of the statute indicates that it applies to

1 pregnancies resulting in live births. In addition, Dennis, supra, would have put a person of
 2 ordinary intelligence on notice that it applied to pregnancies resulting in live births.

3 The denial of this claim by the California Court of Appeal was not an
 4 unreasonable application of clearly established Supreme Court authority. Accordingly, this claim
 5 should be denied.

6 I. Claim 9: Insufficient Evidence of Causation

7 Petitioner argues that there was insufficient evidence that he legally and
 8 proximately caused the death of Marcel.

9 When a challenge is brought alleging insufficient evidence, federal habeas corpus
 10 relief is available if it is found that upon the record evidence adduced at trial, viewed in the light
 11 most favorable to the prosecution, no rational trier of fact could have found “the essential
 12 elements of the crime” proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307,
 13 319, 99 S. Ct. 2781, 2789 (1979). Under Jackson, the court reviews the entire record when the
 14 sufficiency of the evidence is challenged on habeas. Adamson v. Ricketts, 758 F.2d 441, 448 n.
 15 11 (9th Cir. 1985), vacated on other grounds, 789 F.2d 722 (9th Cir. 1986) (en banc), rev’d, 483
 16 U.S. 1 (1987). It is the province of the jury to “resolve conflicts in the testimony, to weigh the
 17 evidence, and to draw reasonable inferences from basic facts.” Jackson, 443 U.S. at 319, 99 S.
 18 Ct. at 2789. “The question is not whether we are personally convinced beyond a reasonable
 19 doubt. It is whether rational jurors could have reached the same conclusion that these jurors
 20 reached.” Roehler v. Borg, 945 F.2d 303, 306 (9th Cir. 1991).

21 If the trier of fact could draw conflicting inferences from the evidence, the court in
 22 its review will assign the inference that favors conviction. McMillan v. Gomez, 19 F.3d 465,
 23 469 (9th Cir. 1994). The fact that petitioner can construct from the evidence alternative scenarios
 24 at odds with the verdict does not mean that the evidence was insufficient, i.e., that no reasonable
 25 trier of fact could have found the conviction scenario beyond a reasonable doubt.

26 \\\

In reviewing the sufficiency of the evidence supporting a conviction, we search the record to determine “whether a reasonable jury, after viewing the evidence in the light most favorable to the government, could have found the defendants guilty beyond a reasonable doubt of each essential element of the crime charged.” United States v. Douglass, 780 F.2d 1472, 1476 (9th Cir.1986). *The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict.* United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir.), cert. denied, 459 U.S. 1044, 103 S. Ct. 464, 74 L. Ed.2d 614 (1982); United States v. Federico, 658 F.2d 1337, 1343 (9th Cir.1981), overruled on other grounds, United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc). United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) (emphasis added).

U.S. v. Mares, 940 F.2d 455, 458 (9th Cir. 1991).

Superimposed on these already stringent insufficiency standards is the AEDPA requirement that even if a federal court were to initially find on its own that no reasonable jury should have arrived at its conclusion, the federal court must also determine that the state appellate court not have affirmed the verdict under the Jackson standard in the absence of an unreasonable determination. Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005).

In the section above addressing petitioner’s claim that the trial court failed to sua sponte read the proximate cause instruction, the court set forth the portion of the opinion by the California Court of Appeal denying petitioner’s claim alleging insufficient evidence that he caused Marcel’s death. For the reasons stated by the California Court of Appeal above, this court finds that there was sufficient evidence that he caused Marcel’s death.

The denial of this claim by the California Court of Appeal was not an unreasonable application of clearly established Supreme Court authority. Accordingly, this claim should be denied.

J. Claim 10: Jury Instruction Error

Petitioner argues that the trial court erred by failing to instruct the jury as to attempted murder, a lesser included offense.

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1 The constitutional right to have the jury instructed on a lesser-included offense in
 2 certain instances was extended to capital murder defendants in 1980. See Beck v. Alabama, 447
 3 U.S. 625, 100 S.Ct. 2382 (1980). Since that time, the Ninth Circuit in Bashor v. Risley has held
 4 “the failure of a state court to instruct on a lesser included offense [in a non-capital case] fails to
 5 present a federal constitutional question and will not be considered in a federal habeas corpus
 6 proceeding.” 730 F.2d 1228, 1240 (9th Cir. 1984). The Bashor court stated that there may be
 7 exceptions to this general statement “because the criminal defendant is also entitled to adequate
 8 instructions on his or her theory of defense.” 730 F.2d at 1240. This court, however, is barred
 9 from creating such a rule, as habeas corpus “cannot be used as a vehicle to create new
 10 constitutional rules of criminal procedures.” Teague v. Lane, 489 U.S. 288, 316, 109 S.Ct. 1060
 11 (1989).

12 Because a claim alleging failure by the state court to instruct on a lesser included
 13 offense is not cognizable in federal habeas, the instant claim is without merit.⁵

14 K. Claim 11: Ineffective Assistance of Trial and Appellate Counsel

15 *Legal Standard*

16 A claim of ineffective assistance of appellate counsel utilizes the same Strickland
 17 standard that is applied to trial counsel. Smith v. Robbins, 528 U.S. 259, 287, 120 S. Ct. 746,
 18 765 (2000).

19 The test for demonstrating ineffective assistance of counsel is set forth in
 20 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). First, a petitioner must show
 21 that, considering all the circumstances, counsel’s performance fell below an objective standard of
 22 reasonableness. Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. To this end, the petitioner must
 23 identify the acts or omissions that are alleged not to have been the result of reasonable
 24

25 ⁵ Also, the undersigned does not understand the logic of this claim. If one attempts
 26 murder of a human being, but the fact of death after the attempt lingers for awhile, the ultimate
 death will nearly always supersede the attempt, i.e., the only possible charge is murder.

1 professional judgment. Id. at 690, 104 S. Ct. at 2066. The federal court must then determine
 2 whether in light of all the circumstances, the identified acts or omissions were outside the wide
 3 range of professional competent assistance. Id., 104 S. Ct. at 2066. “We strongly presume that
 4 counsel’s conduct was within the wide range of reasonable assistance, and that he exercised
 5 acceptable professional judgment in all significant decisions made.” Hughes v. Borg, 898 F.2d
 6 695, 702 (9th Cir. 1990) (citing Strickland at 466 U.S. at 689, 104 S. Ct. at 2065).

7 Second, a petitioner must affirmatively prove prejudice. Strickland, 466 U.S. at
 8 693, 104 S. Ct. at 2067. Prejudice is found where “there is a reasonable probability that, but for
 9 counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at
 10 694, 104 S. Ct. at 2068. A reasonable probability is “a probability sufficient to undermine
 11 confidence in the outcome.” Id., 104 S. Ct. at 2068.

12 In extraordinary cases, ineffective assistance of counsel claims are evaluated
 13 based on a fundamental fairness standard. Williams v. Taylor, 529 U.S. 362, 391-93, 120 S. Ct.
 14 1495, 1512-13 (2000), (citing Lockhart v. Fretwell, 113 S. Ct. 838, 506 U.S. 364 (1993)).

15 The Supreme Court has recently emphasized the importance of giving deference
 16 to trial counsel’s decisions, especially in the AEDPA context:

17 In Strickland we said that “[j]udicial scrutiny of a counsel’s
 18 performance must be highly deferential” and that “every effort
 19 [must] be made to eliminate the distorting effects of hindsight, to
 20 reconstruct the circumstances of counsel’s challenged conduct, and
 21 to evaluate the conduct from counsel’s perspective at the time.”
 22 466 U.S., at 689, 104 S.Ct. 2052. Thus, even when a court is
 presented with an ineffective-assistance claim not subject to §
 2254(d)(1) deference, a [petitioner] must overcome the
 “presumption that, under the circumstances, the challenged action
 ‘might be considered sound trial strategy.’” Ibid. (quoting Michel
v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

23 For [petitioner] to succeed, however, he must do more than show
 24 that he would have satisfied Strickland’s test if his claim were
 being analyzed in the first instance, because under § 2254(d)(1), it
 25 is not enough to convince a federal habeas court that, in its
 independent judgment, the state-court decision applied Strickland
 26 incorrectly. See Williams, *supra*, at 411, 65 S. Ct. 363. Rather, he
 must show that the [] Court of Appeals applied Strickland to the

1 facts of his case in an objectively unreasonable manner.

2 Bell v. Cone, 535 U.S. 685, 698-699, 122 S. Ct. 1843,1852 (2002).

3 *Failure to Object to Constructive Shackling*

4 Petitioner argues that his trial counsel was ineffective for failing to make every
5 effort to keep petitioner's custody status from being disclosed to the jury. Assuming counsel's
6 failure to address the propriety of revealing petitioner's custodial status to the jury did not fall
7 below the standard of competent counsel, petitioner argues that counsel was ineffective for
8 failing to request an adequate advisement concerning his custodial status.

9 As discussed above, there is no evidence in the record demonstrating that the jury
10 saw petitioner in physical restraints, i.e. shackles. However, the record is clear that the jury was
11 aware that petitioner was in custody.

12 Petitioner provides no authority in support of his claim that counsel had good
13 grounds to object that the jury should not have known of his custody status. As discussed above,
14 the United States Supreme Court has never held that the jury's knowledge of a criminal
15 defendant's custody status is unconstitutional. Under California law, "the mere fact that the jury
16 is made aware of a defendant's custodial status does not deprive the defendant of his
17 constitutional rights." People v. Valdez, 32 Cal.4th 73, 121, 8 Cal.Rptr.3d 271 (2004). Because
18 this court is aware of no legal grounds to support the objection urged, it finds that petitioner's
19 counsel was not ineffective for failing to make this objection or to request the advisement
20 concerning petitioner's custodial status.

21 After independently reviewing the record, the court finds that the denial of this
22 claim by the California Supreme Court was not an unreasonable application of clearly established
23 Supreme Court authority. Accordingly, this claim should be denied.

24 *Failure to Object to Causation Instructions or Request Adequate Instructions*

25 Petitioner argues that his trial counsel was ineffective for failing to request
26 CALJIC 3.40. As discussed above, in claim four petitioner argued that the trial court erred in

1 failing to give this instruction sua sponte. In the discussion of claim four above, the court found
 2 that petitioner was not prejudiced by the trial court's failure to give this instruction. For the same
 3 reason, the court finds that petitioner was not prejudiced by counsel's failure to request this
 4 instruction.

5 Petitioner also argues that appellate counsel was ineffective for failing to raise this
 6 claim on appeal. As discussed above, appellate counsel did raise this claim on appeal but it was
 7 found defaulted by trial counsel's failure to object. This claim is without merit.

8 After independently reviewing the record, the court finds that the denial of this
 9 claim by the California Supreme Court was not an unreasonable application of clearly established
 10 Supreme Court authority. Accordingly, this claim should be denied.

11 *Failure to Object to Prosecutor's Discriminatory Religious Challenges*

12 Petitioner argues that trial counsel was ineffective for failing to object to the
 13 prosecutor's use of the peremptory challenge based upon potential juror Hubbard's religion.

14 In its discussion of petitioner's related Wheeler claim, the California Court of
 15 Appeal expressed doubt as to whether such an objection had merit under California law:

16 Whether the exclusion of jurors based on religion per se raises a cognizable
 17 Wheeler claim is at best ambiguous in current law. Defendant does not cite any
 18 case law that says so expressly and unequivocally. He relies on People v. Martin
 19 (1998) 64 Cal.App.4th 378, in which the court construed dictum in Wheeler,
 20 supra, 22 Cal.3d 258, as leaving open the possibility of extending its rule to
 21 religious discrimination but did not find such discrimination in the case at bench
 22 because the challenged juror had revealed that his specific beliefs would preclude
 23 jury service. (People v. Martin, supra, 64 Cal.App.4th at pp. 384-385; see also
People v. Garcia (2000) 77 Cal.App.4th 1269 1281 fn. 9.) Defendant also cites
People v. Allen (1989) 212 Cal.App.3d 306 at page 312, in which the court
 referred in a footnote to dictum from People v. Johnson (1989) 47 Cal.3d 1194 at
 page 1215, stating summarily that religious bias is a cognizable form of group
 bias. (People v. Allen, supra, 212 Cal.App.3d at p. 312, fn 4; see People v.
Garcia, supra, 77 Cal.App.4th 1269, 1281, fn. 9 [explaining why statement from
People v. Johnson, supra, 47 Cal.3d 1194 is dictum].) [Footnote]

24 [Footnote: In People v. Cash (2002) 28 Cal.4th 703, not cited by
 25 defendant, our Supreme Court recently commented on this issue without
 26 coming any closer to resolving it. The court first stated: "Although this
 court has described the protections against group exclusion as including
 religious affiliation, the United State Supreme Court has only applied

Batson [v. Kentucky (1986) 476 U.S. 79 [90 L.Ed.2d 69]] to forbid group exclusion based on race or gender. [Citations.]” (People v. Cash, *supra*, 28 Cal.4th at p. 724 (not citing any California Supreme Court case).) The court then found that the prosecutor’s stated reasons for excluding a juror raised as a Jehovah’s Witness which included both religious and nonreligious grounds, were facially plausible and sufficient to rebut the defendant’s claim of racial discrimination (which, as in our case, was the only one raised by the defendant). (*Id.* at pp. 724-726.)]

Given the vagueness of the current law on this issue, it would be unfair to impose a duty on this trial court to have inquired sua sponte, without being prompted by any argument from the defendant, whether the prosecutor had improperly excluded jurors based on religious bias.

Opinion of California Court of Appeal, pp. 22-24.

In the instant case, the prosecutor did not reject Mr. Hubbard based on his religion per se. Rather, she stated that in her experience, people with religious convictions as strong as Mr. Hubbard’s had difficulty judging criminal cases. She was also concerned by the fact that petitioner had a Bible sitting in front of him. As discussed by the California Court of Appeal, this type of peremptory challenge has been upheld by California courts. *See People v. Martin*, 64 Cal.App.4th 378, 385, 75 Cal.Rptr.2d 147 (1998) (Wheeler does not preclude a peremptory challenge to a juror on the basis of the juror’s relevant personal values “even though those views may be founded in the juror’s religious beliefs.”).

It is true that Mr. Hubbard did not explicitly state that his ability to judge petitioner’s case was impacted by his religious beliefs. However, based on the state of California law, a federal law, *see* cases cited *supra* in section F, it is not likely that the trial court would have upheld an objection by petitioner’s trial counsel on the grounds now suggested. For this reason, the court finds that petitioner has failed to demonstrate prejudice based on counsel’s failure to make this objection.

After independently reviewing the record, the court finds that the denial of this claim by the California Supreme Court was not an unreasonable application of clearly established Supreme Court authority.

||||

1 *Failure to Object to Prosecutor's Violation of Protective Order*

2 Petitioner argues that counsel was ineffective for failing to immediately object to
3 the violation of the protective order by Ore. As discussed above, the California Court of Appeal
4 found that this claim was waived by counsel's failure to timely object.

5 Part of the problem with this claim is that petitioner does not explain how the
6 outcome would have been different had counsel objected at the time of the testimony. Petitioner
7 does not explain how the remedy fashioned by the trial court for the violation of the protective
8 order would have been any different had counsel timely objected. This court finds it unlikely that
9 the remedy for the violation of this order would have been different had counsel timely objected.

10 The only consequence this court can find of trial counsel's failure to timely object
11 is that the California Court of Appeal found petitioner's related prosecutorial misconduct claim
12 to be waived. However, as discussed above, this claim had no merit anyway as there was no
13 evidence of misconduct by the prosecutor. Accordingly, the court does not find that petitioner
14 suffered prejudiced as a result of counsel's failure to timely object.

15 After independently reviewing the record, the court finds that the denial of this
16 claim by the California Supreme Court was not an unreasonable application of clearly established
17 Supreme Court authority.

18 *Failure to Argue in Opening Brief that Petitioner Entitled to Instruction on*
19 *Attempted Murder of Human Being*

20 Petitioner argues that appellate counsel was ineffective for failing to properly raise
21 in the opening brief the claim that if attempted murder of a fetus was not a lesser included
22 offense, then petitioner was entitled to an instruction on attempted murder of a human being as a
23 lesser included offense. Petitioner also argues that appellate counsel was ineffective for failing to
24 cite any authority in support of this proposition.

25 On appeal, petitioner argued that the trial court erred by failing to instruct sua
26 sponte on attempted murder of a fetus as a lesser included offense. In his appellate reply brief, he

1 argued for the first time that if attempted murder of a fetus was not a lesser included offense
2 under the operative pleading, then he was entitled to an instruction on attempted murder of a
3 human being as a lesser included offense. Opinion of California Court of Appeal, pp. 25-26.

4 The California Court of Appeal found that petitioner had waived his claim raised
5 for the first time in his reply brief but went on to address its merits:

6 It is improper to raise new contentions in the reply brief. (Neighbours v. Buzz
7 Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8.) [Footnote omitted.]
Therefore, this contention is forfeited.

8 In any event, defendant does not cite any authority holding that attempted murder
9 is a lesser included offense to murder, but merely asserts this proposition. A legal
proposition asserted with apposite authority necessarily fails. (Amato v. Mercury
10 Casualty Co. (1993) 18 Cal.App.4th 1784, 1794.)

11 But even assuming that attempted murder of a human being was a lesser included
12 offense to murder as pleaded here, and even assuming an instruction on attempted
murder of a human being should have been given, any error in failing so to
13 instruct was harmless: in light of the entire cause, including the evidence, it is not
reasonably probable that defendant would have obtained a more favorable
14 outcome had the instruction been given. (People v. Breverman, supra, 19 Cal.4th
at p. 178.) His conduct was brutal, and the words he spoke as he repeatedly
15 punched Gavon White in the stomach—"I don't want this bitch to have my
baby"—made clear his intent to kill the fetus she was carrying. On these facts a
reasonable jury could not have found that his crime was merely one of attempt.

16 Opinion of California Court of Appeal, pp. 26-27.

17 Although appellate counsel failed to properly raise the claim alleging that
18 petitioner was entitled to an instruction on attempted murder of a human being as a lesser
19 included offense, the California Court of Appeal addressed the merits of this claim anyway.
20 Because the California Court of Appeal found that this claim was without merit, petitioner was
21 not prejudiced by appellate counsel's failure to properly raise this claim. Nor does petitioner cite
22 any authority that appellate counsel should have cited that would have changed the outcome of
23 the state appellate decision.

24 After independently reviewing the record, the court finds that the denial of this
25 claim by the California Supreme Court was not an unreasonable application of clearly established
26 Supreme Court authority.

1 *Failure to Investigate and Locate Medical Experts*

2 Petitioner argues that trial counsel was ineffective for failing to locate and call as
3 an expert witness a medical expert who could have provided additional testimony concerning the
4 likelihood of NEC developing in babies born to term. In support of this claim, petitioner argues
5 that the prosecutor's experts conceded that NEC may develop in some full term babies and that
6 Marcel's heart condition, not caused by petitioner's assault, was a risk factor for development of
7 NEC.

8 As discussed above, the testimony of the doctors was clear that Marcel died as a
9 result of complications caused by his premature birth. Petitioner does identify any expert or who
10 could have actually testified differently regarding Marcel's chances of developing NEC had he
11 been born to term. Such a conclusory claim should be dismissed. James v. Borg, 24 F.3d 20, 26
12 (9th Cir. 1994) (holding that conclusory allegations which are not supported by a statement of
13 specific facts do not warrant habeas relief); Shah v. U.S., 878 F.2d 1156, 1161 (9th Cir. 1989)
14 (vague or mere conclusory allegations do not warrant an evidentiary hearing).

15 After independently reviewing the record, the court finds that the denial of this
16 claim by the California Supreme Court was not an unreasonable application of clearly established
17 Supreme Court authority.

18 *Failure to Argue that Peremptory Challenges*

19 Petitioner argues that appellate counsel was ineffective for failing to argue on
20 appeal that the prosecutor's use of peremptory challenges to strike potential jurors Hubbard and
21 Wade based on race violated Batson, supra. As discussed above, on appeal, appellate counsel
22 argued that the use of a peremptory challenge to strike Hubbard based on his religious views
23 violated Batson.

24 As discussed above, petitioner's Batson claims based on race are without merit.
25 Had appellate counsel raised these claims on appeal, they would have been rejected. In any
26 event, these claims were raised in petitioner's habeas petition filed in the California Supreme

1 Court. Petitioner does not explain how he was prejudiced by raising these claims in his habeas
2 petition rather than on direct appeal.

3 After independently reviewing the record, the court finds that the denial of this
4 claim by the California Supreme Court was not an unreasonable application of clearly established
5 Supreme Court authority.

6 Accordingly, IT IS HEREBY ORDERED that petitioner's October 27, 2007,
7 motion for discovery is denied; and

8 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of
9 habeas corpus be denied.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
15 shall be served and filed within ten days after service of the objections. The parties are advised
16 that failure to file objections within the specified time may waive the right to appeal the District
17 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: 08/07/08

19 /s/ Gregory G. Hollows

20 taylor.157

UNITED STATES MAGISTRATE JUDGE